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Volume 12

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 28

FEDERAL TRADE COMMISSION,
PETITIONER

vs.

THE CEMENT INSTITUTE, ET AL.

No. 29

FEDERAL TRADE COMMISSION,
PETITIONER

vs.

AETNA PORTLAND CEMENT COMPANY, ET AL.

No. 30

FEDERAL TRADE COMMISSION,
PETITIONER

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY

No. 31

FEDERAL TRADE COMMISSION,
PETITIONER

vs.

CALAVERAS CEMENT COMPANY, ET AL.

No. 32

FEDERAL TRADE COMMISSION,
PETITIONER

vs.

HURON PORTLAND CEMENT COMPANY

No. 33

FEDERAL TRADE COMMISSION,
PETITIONER

vs.

SUPERIOR PORTLAND CEMENT, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 26, 1947.
CERTIORARI GRANTED MARCH 10, 1947.

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(Testimony of Witnesses contained in pages 28228 to 31206 of the Original Transcript.)

28228 New York, N. Y.,
December 7, 1939.

28233 (RESP. EXS. 1476, 1477-A, 1477-B, 1477-C, 1478, 1479, 1480-A, 1480-B, 1480-C, 1481, 1482-A, 1482-B, and 1483 were offered and received in evidence.)

Trial Examiner Norwood: Regarding Commission's Exhibits, for identification, 3235-A to Z-102, and 3236-A to Z-106, those exhibits were incorrectly marked yesterday, and they should be marked 3235-A to Z-114, and 3236-A to Z-107.

Let those papers be marked correctly as stated there.

28234 H. B. ROBESON thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Leisure.

Q. Mr. Robeson, with reference to these Exhibits 1476 through 1483, in selecting these few exhibits for me, are these typical exhibits that you received at that time? What I mean by typical; were they the type of letters you were getting from dealers in connection with your dealers' service payment plan?

A. They were; yes, sir.

Q. On 1475, Exhibit 1475, which was offered yesterday, at the bottom of the page on the lefthand side is typewritten the name "Mr. Harris." Who is Mr. Harris, please?

A. Mr. Harris was our dealer in Providence, the William Harris Company, and Mr. Edison was our district manager in Boston.

28235 Q. I notice in this proffer of Exhibits 1476 to 1483, some of them are from dealer associations and written on the letterhead of dealer associations. What is your usual and customary practice—do you ordinarily answer letters that you receive from dealer associations?

A. Generally speaking, we do not. Dealers' associations, as such, we do not recognize. However, many of our important customers are members of those associations and active and we have to listen to our own customers. That is the principal interest that we have.

Q. Now, in order not to spend further time on this subject, can you tell us in one answer whether or not the information that you received in these exhibits, 1476 to 1483, and others like them which you described, whether you took into consideration the information you received there, and whether it affected your decision as to discontinuing the dealer service plan?

A. Yes, sir; we would and did.

Q. As to these dealer associations, Mr. Robeson, has your company ever adopted any of its policies as a result of any negotiations with any building material dealers' association or organization?

A. No, sir; we have not; no, sir.

28236 The witness identified Resp. Ex. 1484 as instructions which he wrote to Nazareth's district managers on February 12, 1931. The initials are bis and the word "file" is in his handwriting. The other name is Mr. Fred Kunkle, who was one of Nazareth's important salesmen, now its district sales manager. The witness was keeping him informed as to what Nazareth was doing with the district managers. At that time Nazareth had information that Lehigh had issued no quotations in the field and Nazareth was advising its district managers that it did not know exactly what position it would take but that it wanted them to stay with the market and advise

28237 its customers that it would meet any situation, and that eventually it would arrive at a definite decision. That is what happens in a period of change. You don't know whether you want to go along or whether you don't, you feel the situation, but, at least, you must tell your customers that you have the thing under consideration; and Nazareth doesn't intend to lose any business.

28238 (RESP. EX. 1484 was offered and received in evidence.)

By Mr. Leisure:

Q. Now, Mr. Robeson, you said that you wanted more or less to feel the situation out until you determined what action to take.

Did you subsequently send out any announcement to your dealers, indicating your action?

A. I am not sure whether we definitely sent a—

Q. Let me show you Respondents' Exhibit 657, and see

if that refreshes your recollection (handing document to witness).

(Witness examines document.)

Q. That is an announcement issued on February 21, 1931, is it not?

A. Yes, sir; we did. This is a definite statement that we have withdrawn the policy that we were on.

Q. And that is the action you took?

A. Yes, sir.

28239 The witness identified Resp. Ex. 1485 as a letter from the Building Material Men's Association of Westchester County from Nazareth's files; Resp. Ex. 1486 A, B and C as a letter from the New England Builders' Supply Association from Nazareth's files; Resp. Ex. 1487 as a letter from the Camden Lime Company from Nazareth's files.

28245 (RESP. EXS. 1485, 1486-A, 1486-B, 1486-C, and 1487 were offered and received in evidence.)

By Mr. Leisure:

Q. Did your company take the action that it took alone in issuing an announcement as to the kind of work it would sell there, do you know? Do you recollect?

A. Yes. That was our independent policy; yes, sir.

Q. You have told us that you took independent action, and what I am getting at, Mr. Robeson, is whether or not you observed and do you know whether or not other manufacturers took any action at that time?

A. Well, from visits I made in the field and from reports I had from our field men other manufacturers selling these same dealers were exposed to the same pressure, and they undoubtedly went along on some sort of a basis, announced some sort of a policy.

28246 Q. I want to call your attention to a statement in Respondents' Exhibit 1475:

"In towns where there are no qualified dealers to handle carload deliveries we will sell the cement direct to the contractor or consumer."

Did you deviate from that at any time, and, if so, to what extent (handing document to witness)?

Q. I am merely asking you whether or not that is a deviation and to explain if it is or is not.

A. Well, at that time I wrote that and said that was our policy at that time; however, when we made our pub-

lic announcement several months later we then stated that we would refer any inquiries we had from towns where we were not represented to our—to any dealer
28247 that we could find at that point,—that is, any dealer that would be a potential dealer for us.

Q. Was that a deviation from prior policies, from the first?

A. Yes, yes, that's a direct change-over from what we said previously.

Q. Now, was your decision, Mr. Robeson, to follow this 5-cent dealer service payment plan the result of any communication or any understanding you had with your competitors?

A. No, sir.

Q. How long did your company operate under the policy that we have just been discussing, represented by Respondents' Exhibit 657 (handing to witness)?

A. About three or four months, Mr. Leisure.

Q. This is the policy dated February 21, 1931 (handing to witness Respondents' Exhibit 657)?

A. Yes, sir. Through that period, as I recall it, we went on the policy some time in November, and along about January—we didn't make any definite announcement but we were trying to protect our position, and we told the dealers that those customers of ours who were opposed to it that we were considering a change, and that our terms would be just as attractive as any competitor, so that we would hold our position with them, and then we made a formal announcement in February.

28248 Q. And is that a formal announcement?

A. This is the formal announcement; yes, sir.

Q. What I meant is, how long did you keep that in effect?

A. This policy here (referring to Respondents' 657)?

Q. Yes.

A. My recollection of this policy is that it remained in force until—oh, about Code time.

Q. And as to the substance of it, do you still follow any part of it today?

A. I would say we follow a large part of it; yes, sir.

Q. Do you sell any more work directly now than you did at the time that policy was initiated?

A. I would say, currently, that we were probably selling more classes of work direct.

Q. Have you issued any further formal announcement of your policy, in this connection?

A. Yes, we issued an announcement in 193[illegible].

28249 Trial Examiner Norwood: Is there any difference,—any surrounding circumstances of this later announcement; and the previous one, that you have given us the details of?

The Witness: I would have to take them and compare them, Your Honor, but, as I recall, the period we went through after Article XI was suspended in the Code that we were operating on a sort of catch-as-catch-can policy, until finally we did issue an announcement in February, 1935, and then we later amended that in April, 1935. Some competitors of ours had announced a policy which seemed to meet with a good deal of favor with our customers, and we got on the band wagon.

28250 By Mr. Leisure:

Q. Are the Respondents' Exhibits 1489, dated February 21, 1935, and the document dated April 8, 1935, marked Respondents' Exhibit 1488, the announcements that you have just described?

A. Yes, sir; they are.

(RESP. EXS. 1488 and 1489 were offered and received in evidence.)

28251 By Mr. Leisure:

Q. Now, referring to this policy dated February 21, 1935,—have you explained fully the circumstances under which you adopted that? You have told us something; I don't know whether you—

Trial Examiner Norwood: If they are any different from the circumstances under which you adopted the other one, you may tell us about it; if they are not, I do not see any use in going into minute details about those things. Go ahead.

A. Well, the only thing I can say, Your Honor, is that we were without a definite policy. Our customers were asking us for this, that, and the other thing; and the Lehigh Company made an announcement of a policy, and the dealers were responding very favorably to it, and immediately asked us whether or not we would give them the same sort of protection. We had the dealer good will—customer good will—involved, and; in so far as we saw the dealers' response was favorable, why, yes, we immediately wanted

to get what good will we could, and we told the dealers "yes," why, we would give them exactly the same protection that the Lehigh Company had offered them.

28252 The witness identified Resp. Ex. 1490 A and B as a typewritten copy of the information which was dictated over the telephone by Nazareth's New York office to its people in Nazareth, giving the details of the Lehigh announcement.

Q. And was that the first word that you personally had of this plan?

A. That was; yes, sir.

Q. Being adopted by them?

A. Yes, sir.

Q. Do you know the date you got the telephone call, Mr. Robeson?

A. It was the day the Lehigh announcement hit the field.

28260 (RESP. EX. 1490-A and 1490-B was offered and received in evidence.)

28261 The witness identified Resp. Exs. 1491 A and B as a manual which he wrote to Nazareth's district salesmen on February 21st, outlining to them that Nazareth had the information that Lehigh had made a general announcement of marketing policy and outlining to them what Nazareth would do.

Mr. Leisure: I offer Respondents' Exhibit 1491-A and B in evidence (handing to Mr. Paulson).

Mr. Paulson: This, Your Honor please, is a needless statement of similar mental operations of this Respondent with regard to the establishment of sales policy, and deal with such immaterialities that it should not be received in evidence.

We object.

Trial Examiner Norwood: This was written by this witness?

The Witness: Yes, sir.

Trial Examiner Norwood: This contains many factual statements, and an argument here, and questions of

28262 opinion, and it seems to me this witness might tell us about it.

Mr. Leisure: Well, if Your Honor pleases, I could have him tell in detail what he wrote there at the time, but this exhibit would save much time.

Trial Examiner Norwood: No, let him tell us the facts.

You need not use this at all, unless it is necessary. Maybe he wrote some things that would be incompetent here as evidence, and I do not want him to tell that. It seems to me that there is considerable in this paper that is incompetent. Here is an argument here, and Counsel knows how to bring that out.

I sustain the objection to that.

What is the number of that?

The Witness: 1491-A and B.

Mr. Leisure: And to state to Your Honor the purpose of the offer.

The Commission has charged that this was done by collusion. Here is the action which this official took that morning himself. Now, he either took this action as indicated, independently, and for the best interests of his company, or he prepared this document back in 1935 for the purpose of offering it in evidence at this trial today, for the
28263 purpose of negativing collusion.

Now, if he took this action in 1935, bona fide, as we contend, and he contends, then it does negative collusion. Therefore, I think the instructions which he gave to his salesmen at that time should be in evidence.

Trial Examiner Norwood: Now, this witness can tell us what action he took there, all the relevant parts of it; but their arguments and statements of opinion and things like that, which that exhibit contains, would not be received here probably, anyway; I would prefer that he tell us about it; it is a paper he wrote. Simply speaking, it is not receivable if he can testify to the facts independently.

Mr. Leisure: —may I just have the Reporter, without my reading it, copy it with the understanding that I am offering it to show that these are the instructions which he gave to his salesmen at the time which we say negative collusion?

28266 By Mr. Leisure:

Q. Mr. Robeson, you have told us that you received a report over the telephone as to the Lehigh plan. Did you get any other reports, other than that report?

A. Yes, sir; that day we were able—later in the day we were able to pick up a copy of it, at a dealer in Nazareth, at the Trumbower Lumber Company.

Q. Did you communicate that information to your salesmen?

A. I did, sir; yes, sir; I wrote our district managers that day.

Q. Did you have your local printers run off copies?—

A. Yes, sir.

Q. —of an announcement for yourself?

A. Yes, it was printed right in Nazareth.

Q. And did you inform your salesmen that you were doing that?

A. Yes, sir; we mailed our announcements, I am sure, that day.

Q. Now, in giving instructions to your salesmen that day, did you give any consideration to the manner in which the Lehigh plan was being received?

A. Yes, sir, the reports we had from our district offices reported the dealers as being favorable to the idea.

28267 Q. Did you have any discussion with your salesmen as to whether or not you wanted them to act promptly so that you would not be far behind Lehigh, and your dealers?

A. Yes, our instructions would be to the district managers to inform their field men immediately to tell the dealers, particularly those that liked it, that we were going to meet it.

28275 Q. And in sending it out did you or did you not ask your salesmen to keep you fully informed as to what your competitors were doing with regard to policies at that time?

A. Yes, sir; our instructions to our sales force would be to first give us the reaction of all of our customers both favorable and unfavorable reactions, and at the same time keep us fully informed as to what further announcement the dealers got as to their manufacturers adopting a similar policy.

Q. Now, Mr. Robeson, there has been considerable discussion in the direct case by the Commission and in our case with reference to Article XI of the Code, so I would like to ask you a question about it.

To what extent did Article XI represent a change in the sales policy of your company?

A. I do not believe it made any great change in the practices that we had been using as a sales policy. It merely set down in writing an accumulation of policies that we had had.

Q. Do you recall what caused the suspension of Article XI?

A. It was protests from the dealers that caused the suspension.

28278 The witness identified Resp. Ex. 1608 A and B, dated January 7, 1935, as having to do with the posi-
28279 tion which Nazareth had taken on its marketing policy prior to the announcement of the February, 1935 policy.

28280 The witness identified Resp. Ex. 1609 A and B as a letter addressed to Nazareth's Boston office from Manchester & Hudson, dealers at Providence, R. I.
28281 The letter is dated January 2, 1935.

(RESP. EXS. 1608-A, 1608-B, 1609-A, 1609-B, were offered and received in evidence.)

28283 The witness identified Resp. Exs. 1492 to 1553 as letters which Alpha received from its dealers over a wide area regarding the Cement Code. The witness identified Resp. Ex. 1554 as a typical Alpha reply to the dealers.

28291 Trial Examiner Norwood: On the record.

I shall reserve the ruling on these papers until I can look over them.

28293 By Mr. Leisure:

Q. Mr. Robeson, you told us a few minutes ago what led up to an announcement of your February policy. We have since that time offered in evidence an April policy.

Do you have in mind the policy that I am now referring to? I am referring to Respondents' Exhibit 1488.

28294 What led you to announce that policy, Mr. Robeson?

A. Well, after the February policy was announced and dealers had an opportunity to examine it, they began to find some fault with it, and they were coming back and asking for changes, and in April Lehigh announced another policy, and we automatically met that, and that is the policy we are on as of today.

The witness identified Resp. Ex. 1610 A and B as a memorandum which the witness wrote to Nazareth's Philadelphia district sales manager about its policy; Resp. Ex. 1611 A as the letter received from the Hill City Coal & Lumber Company, Summit, New Jersey, about Nazareth's policy; Resp. Ex. 1612 as a letter which he wrote to Nazareth's local salesmen who calls on the Hill City Coal & Lumber Company, advising him to call on the dealer in

view of the dealer's letter to Nazareth. That is all
28295 the action Nazareth took prior to its announcement of its April policy and they were the circumstances which led Nazareth to the adoption of that policy.
28299 Trial Examiner Norwood: They will be received on condition. They will be received for that purpose only, for the purpose of showing what instructions he gave and not for establishing the truth of the statements contained therein.

Now, if that is the way you want it, I shall receive them that way.

28307 Mr. Leisure: I do not think they ought to be qualified in their admission. I think they ought to be admitted just as I have suggested they ought to be admitted, as his statements at that time.

28309 Trial Examiner Norwood: To make it clear, I will state that these exhibits are objected to, so far as they are offered to prove the truth of the factual statements contained therein.

Mr. Paulson: That is the law.

Trial Examiner Norwood: But, otherwise, they are received to show what instructions he sent, and to complete his evidence in that respect.

28310 (RESP. EXS. 1610-A, 1610-B, 1611-A, 1611-B, and 1612 were offered and received in evidence.)

28311 The witness identified Resp. Ex. 1613 A and B as a Lehigh sales policy announcement which was picked up by the Nazareth field organization from its customer, Trumbower Lumber Company, a dealer at
28312 Nazareth. He is unable to state whether Resp. Ex. 1613 A and B is the same as Com. Ex. 2662 A and B, and would have to confirm it step by step.

28314 (RESP. EX. 1613-A and 1613-B was offered and received in evidence.)

By Mr. Leisure:

Q. Now, with reference to your policy, Mr. Robeson, of April 8, 1935, what have you had occasion to observe as to the effect on your dealers, if any?

A. From my observation by field contact with them, that seemed to satisfy them, and we had continued to operate on that policy ever since.

Q. Well, now, you say operate under the policy. To what extent do you adhere to the policy? Are there any exceptions?

A. That is our basic policy. There would not be any exceptions to it except where I would authorize them to meet competition.

28316 Mr. MacIntyre: That would not meet the issue at all if it were true, and was proven.

Trial Examiner Norwood: I can't see that it does.

28317 Trial Examiner Norwood: Well, give us any facts in regard to that.

A. Well, I don't have any specific instance at the moment that comes to my mind, Your Honor, but I do have field experience and sales experience. I sold dealers for a good many years as a field salesman, in my time, and know something about the dealer's mental make-up, the stimulus that he responds to, that if we were to announce a policy and then we were to deviate from that policy, which our dealer felt was detrimental to his interests, we would lose his good will.

28318 The witness identified Resp. Ex. 1614 as a letter addressed to Nazareth by a dealer in Allentown taking Nazareth to task for a direct sale it made in Allentown; Resp. Ex. 1615 A and B as a letter which the witness wrote to Nazareth's salesman covering that territory telling him to call up and outline to Mr. Erich what Nazareth's policy was and what it was doing. The letter (Resp. Ex. 1614) was received from the dealer in Allentown.

28319 (RESP. EXS. 1614, 1615-A and 1615-B were offered and received in evidence.)

28320 By Mr. Leisure:

Q. I do not know whether I asked you, Mr. Robeson, whether or not Respondents' Exhibit 1615-A and B represents your policy?

A. Yes, sir; it is an explanation to my field man as to what our policy is, and the way we handled it.

Q. Now, as to this April 8, 1935, policy, did you have any knowledge of what your competitors were going to do, or did you issue it as the result of any communication or agreement with them in any way?

A. No, sir; I did not.

Q. Now, how has that worked out?

First, let me ask you, have you continued to follow that policy?

A. That's basically our policy today; yes, sir.

Q. Yes. How has it worked out, Mr. Robeson, since you have had a definite policy to sell certain kinds of work direct and certain kinds of work through a dealer? I would like for you just to explain that.

A. It seems to work out satisfactorily, Mr. Leisure.

Q. What are your reasons for maintaining it?

A. Well, basically, it is a policy that we can operate under. We have told the dealer exactly what classes
28321 of business we intend to sell direct, such as U. S. Government and contractors doing jobs, road jobs, removed from municipalities, and the dealer has a definite statement from us, and when we make such direct sales he knows we are making them in line with our announced policy,—we we are not breaking faith with him at all. We said that is what we are going to do, and we are doing it, and, by the same token, any business, of course, that comes up, which, under our policy, is business which we feel the dealer can service, and we have so announced in our policy, why, we refer that to the dealer.

28340 By Mr. Leisure:

Q. Mr. Robeson, can you tell me,—and I am going to ask you to refresh your recollection from Respondents' Exhibit 1616, for identification, if you do not know without such assistance,—what your distribution of sales was to dealers in 1924, as you said?

Trial Examiner Norwood: Did you ever have an accurate knowledge of those figures?

28341 The Witness: Yes.

Trial Examiner Norwood: That are on that paper (referring to Respondents' Exhibit, for identification, 1616)?

The Witness: Yes, Your Honor.

Trial Examiner Norwood: In looking at that, does it refresh your recollection?

The Witness: Yes, Your Honor.

Mr. Leisure: He has told us that he uses that with his salesmen from month to month.

The Witness: Your Honor, we ship so many hundred thousand barrels of cement a year.

Trial Examiner Norwood: Yes.

The Witness: Now, then, we take on our records—we ship a car, 231 barrels to a dealer—that is thrown under the dealer column. If we ship a car of 231 barrels to a

contractor, that is thrown under the contractor column; if we ship it to a railroad, it is placed under that column; if we ship it to a concrete product manufacturer, it is placed under the concrete product manufacturer column; if we sold it directly to the Government, or State, it is placed there.

When we get through, at the end of the month, we total up all the shipments we make to every one of those various classes; that gives us the total tonnage for that
28342 month. We know what our total shipments were.

We divide the amount of tonnage shipped to each class against the total, and that gives us the percentage of each one of the classes.

Trial Examiner Norwood: You do that work yourself?

The Witness: No, sir; I do not. I have detail people that do that.

Trial Examiner Norwood: Did you ever have these things so that you can tell from memory,—these totals there, those percentages (referring to Respondents' 1616, for identification)?

The Witness: Those totals—I wouldn't be able to remember all the totals; no, sir.

Trial Examiner Norwood: Or the percentages that you could give from memory at any one time of a month?

The Witness: Oh, I could make a round statement that our dealer business would amount to about 80 percent, and another class that and that.

28347 Q. Referring to your announcement of April 8, Mr. Robeson, which is now marked Respondents' Exhibit 1458, with respect to the definition of a dealer, How do you interpret that definition (handing document to witness)?

A. Why, we consider an established cement dealer one who has an established place of business, and proper facilities, and carries proper stock for performing the dealer function in his community.

Q. Well, as to this announcement which the Examiner has just referred to, I want to know whether or not you are governed by the conditions you find in the par-
28348 ticular market, or whether this applies with equal force in every market?

That is what I would like to find out.

A. No. A dealer—it would depend a great deal upon

the community in which he operates. A dealer in a small community would not carry the same amount of materials and have the same delivery equipment a dealer would in a larger community.

Q. What I want to get at, is there any rule you follow under all circumstances regardless of the location of the dealer?

A. No, sir. It is an application of our experience.

Trial Examiner Norwood: The rule is not inflexible?

The Witness: No, sir.

By Mr. Leisure:

Q. Well, then, to what extent, if at all, are you guided in your interpretation in that definition by the recognition, or, shall we say, non-recognition of a particular person as a dealer by your competitors?

A. No, sir. We exercise our own judgment in every case.

Q. Now, in coming to the conclusion that you would use the paragraph in your policy, did you consider that in using the paragraph you have used that you were using an arbitrary or unreasonable provision?

A. No, sir; it is just a general declaration

Q. There was offered in evidence by the Commission an exhibit, numbered 561. I would like to ask you whether or not, or, at least, to what extent, if at all, it af-
28349 fected or changed the terms of sales or marketing methods of your company?

A. It did not affect them in any way, sir.

The witness identified Resp. Ex. 1617 as an inter-office memo which he sent to his two district managers on January 2, 1936, sending to them a copy of this compendium (Com. Ex. 561). It represents Nazareth's policy as of that time. He sent it along to them as a matter of information. It did not make any change in Nazareth's method.

28351 (RESP. EX. 1617 was offered and received in evidence.)

28352 The witness identified Resp. Ex. 1618 as a statement of Nazareth's total shipments from the year 1934 to 1938, inclusive, and showing whether it shipped an increase or decrease from the preceding year. It was prepared for use in this proceeding under his supervision and is a correct and accurate statement of Nazareth's total ce-

ment shipments showing percentage of annual in-
28354 crease or decrease. This tabulation was not made
28355 by the witness personally but it was made under his direction.

(RESP. EX. 1618 was offered and received in evidence.)

28357 Q. Mr. Robeson, I covered in your testimony a number of points here that are covered by the complaint in this action, such as basing points, and the freight rate books, and diversions and contract forms, and a number of other items of that character, as to any of those I would like to ask you whether or not you arrive at the policy followed by your company or as to your action with respect to any of them by agreement of any kind or understanding with your competitors?

A. No, sir.

Cross-Examination by Mr. Paulson.

Q. Mr. Robeson, when you obtained the Lehigh price list December 8, 1936, which is Commission's Exhibit 551-J to 3-M, I believe, did you understand those quotations would be effective until further notice?

28358 A. No, sir.

Q. What did you understand?

A. Why, I understood that that was their current market price at those points.

Q. How long was that? Was it your understanding that they were effective just for the day?

A. Well, I understood it was their current market price until they changed it again; yes, sir.

Q. Until they changed it?

A. Yes, sir.

Q. Did you pick up other quotations from the Lehigh office later that summer, or that winter,—December 8th? After December 8th?

A. If they made any further changes, I probably did; yes, sir. I picked them up after they were in the field.

Q. I am going to show you Commission's Exhibit 551-J, running through to 551-M, and ask you if that is a copy of one of the quotations which you secured from the Lehigh office?

A. I do not recollect it, particularly.

Q. I call your attention, Mr. Robeson, to the fact that these were produced by you under subpoena duces tecum.

A. I say I do not recollect it particularly, but if they were, we had them. I asked Lehigh for them; yes, sir.

Q. And would that be true as to each of the succeeding announcements of Lehigh during the period from December 8th, running up until the arbitraries were with-
28359 drawn, and in the New York and Boston areas?

A. Well, we would develop information in the field of any changes, and when we found there were changes in the field, Lehigh's price already having been effective in the field, I would not hesitate to ask them if they would give me the information.

Q. About how many changes, do you recall, during the period succeeding December 8th through and until the New York and Boston markets were put back on the basing-point basis?

A. I have no distinct recollection of the number.

Q. Well, do you recall having secured from Lehigh's office the announcement of policy, which is Commission's Exhibit 551-N, running through several pages?

A. Announcement of policy?

Q. Announcement of prices for the arbitrary zone?

A. Yes, I recall that.

Q. Do you recall getting it from the Lehigh office?

A. Yes.

Q. And is the same true of the Commission's Exhibit 551-X, and running through several pages?

A. If that was their change of December 9, 1936, yes, after their quotations were in the field I asked them for a copy.

Q. Did you continue to ask for copies from the Lehigh Company throughout that period?

28360 A. If I found changes in the field which indicated to me there was a change after the quotations were in the field, yes, I would ask them for a copy.

Q. Mr. Robeson, I believe on direct you said that base-point price did not represent your mill net; is that correct?

A. We do not have a base at our mill particularly.

By Mr. Paulson:

Q. Well, as to base-point prices I think you said that from base-point price you would have to subtract cash discount and paper sacks in order to get mill net?

A. No, mill net is what we receive, and in order to calculate our mill net we take off the package and the cash discount—I mean, that is our mill net.

Q. That is what I am getting at, but in the instances where the customer does not take the cash discount, then your mill net is—

A. It would be increased to that extent.

Q. Increased to that extent?

A. Yes.

Trial Examiner Norwood: Would that be your base price?

28361 Mr. Leisure: He does not have a base. He is not a basing-point mill.

The Witness: We do not have a base price.

Trial Examiner Norwood: Oh.

By Mr. Paulson:

Q. And you do not find your mill net by subtracting the value of the paper sacks in all instances, do you?

A. Yes, your mill net would be the pure money that we have.

Q. Isn't part of the cost of the paper sacks,—part of the charge that you make for paper sacks,—profit?

A. I would say that this year we probably have a little difference, a slight difference between what our actual cost was and what we charge the customer. However, that is the exception to all the years that I have been in the cement business.

Q. Well, you do not deduct anything from what you bill the customer for paper sacks, do you?

A. Oh, no. We charge the customer for paper sacks.

Q. They should by rights be included, then, in the mill net to arrive at a proper definition of mill net,—you would leave your paper sacks in, then?

A. No. In other words, mill net to us means what we have, what have we got money that we can figure our cost against.

Q. You got the money for the paper sacks.

A. Yes, but, on the other hand, we have already

28362 paid that money out for paper sacks.

Q. It is more properly chargeable to expense than it is deductible from—to determine mill net, isn't it?

A. (No response.)

Q. Well, in answer to Mr. Leisure's question, I think

you said it was misleading to consider base-point price being equal to mill net in any instance because the base-point price included the cash discount and the paper sacks.

Mr. Leisure: I think there is some mistake. I do not think I discussed basing points with this witness. He told us that his mill is a non-base mill and I did not go into that discussion with him. It may have been under other witnesses, but I do not believe I discussed it with this witness.

By Mr. Paulson:

Q. Are you a base mill, Mr. Robeson?

A. No, we do not have a base mill; no, sir. There is a base in the Lehigh Valley but we do not feel that we have a base at our mill.

Q. Aren't you in the Lehigh Valley?

A. We are in the Lehigh Valley; yes, sir.

Q. You are on a par with all the mills in the Lehigh Valley, aren't you?

A. Yes, when you get beyond the scale. In other words, there is, to my recollection, but I think Lone
28363 Star figure they are; use their mill as a freight rate point, and the Atlas do it at Northampton, and the Allentown at Evansville. I think Lawrence do it at Siegfried.

Q. What is the base price at Northampton?

A. The maximum we could get at Nazareth after cash discount would be $1.45. That is the maximum we can get.

Q. Sometimes you get $1.55 because the customer does not deduct or take the cash discount?

A. Where a customer would fail to take the cash discount.

Q. In the $1.45 figure, in arriving at that, I understand you have deducted 15 cents for paper sacks.

A. In other words, we have no credit in the package. I said it would be 15 cents for paper, 40 cents for cloth.

Q. For package?

A. Package.

Q. In other words, you really got $1.60 from the customer for the cement you sold in the paper sacks?

A. Assuming he discounted, yes, and it was in paper.

Q. And if he did not discount you got $1.70?

A. Yes, add 10 cents.

Q. From what markets have you withdrawn in the last 10-year period, Mr. Robeson?

A. Well, principally up around the northwestern section of New York State, and from the Washington market, as such. In other words, we still do ship one
28364 little dealer on the outer fringe of Washington, but we do not go into Washington proper.

Q. Have you included any territories in your general sales territory to counter-balance the withdrawals there?

A. Well, there was no other markets that we can go to in the Lehigh Valley.

Q. Do you go to any market now that you did not go to 10 years ago?

A. No, sir.

Q. You have not extended the circumference of your sales territory any?

A. No, sir. Our market had contracted rather than expanded in 10 years.

Q. How large a volume did you sell in those territories in which you have withdrawn, as an average?

A. We do not have any particular reason to remember the figure. I have not really studied it from the standpoint of tonnage.

Q. Five percent?

A. One guess would be about as good as the other.

Q. You never were active in the Washington market, were you?

A. Not particularly so. We had a few big jobs at a time in Washington.

Q. Were you ever active in up-State New York?

A. Oh, yes, yes; we had customers in around Buffalo area.

Q. You say you have withdrawn from there now?

28365 A. Oh, yes. In other words, we make an occasional shipment into Buffalo for a particular good contractor, a friend of ours who always uses our brand; if he went up there, had a job, why, we would unquestionably follow him and service him on that job.

Q. Did the inauguration of trucking cause you to withdraw up there?

A. No. The principal reason was the fact that the net was unsatisfactory to start with, and, in the second place, we could not continue to give the dealers service up there.

They could get overnight service from the local mills. Our running time would be three or four days.

Q. Well, did your withdrawal coincide with the inauguration of trucking up there?

A. I do not recall that, particularly.

Q. You do not recall the circumstances or time?

A. No, sir.

Q. You do not associate the time of your withdrawal with any incident in Buffalo?

A. No, I do not; no, sir.

Q. Was there a change in price up there that caused you to withdraw?

A. Well, I do not have any specific period in mind. When we withdrew from the Buffalo market we just told our salesmen who covered that section to concentrate his efforts further east.

28366 Q. You really had not withdrawn, had you, formally?

A. Oh, formally—in other words, we would sell a carload of cement, as I said before, to a customer today if it was somebody we wanted to maintain our contact with.

Q. What I am trying to get at is what made it less attractive to you at one time than it formerly was?

A. Well, principally, as I say, the net.

Q. Freight rates did not go up, did they?

A. Well, freight rates have gone up in that 10-year period, yes. At the present time you have the emergency charge on there, which—

Q. Buffalo dealers are getting more service from some of your competitors than you could give them?

A. Unquestionably, yes.

Q. Is that trucking service?

A. Well, partly, yes. They do get trucking service, but they get overnight rail service.

Q. What is the cost of moving a barrel of cement about 300 miles by rail?

A. Oh, the rate would vary depending upon the direction you were going in, and the tariffs that apply; whether you are on one scale, whether you are on another scale.

Q. Well, about what does it run?

A. I would not have a figure in my mind.

Q. You do not have any approximation?

28367 A. No, I do not; no, sir.

Q. Do you still sell in Maine?

A. No, sir; we do not sell in Maine except on an occasional order. If we had some customer of ours to whom we sell greatly in our particular territory, and he had a job up in Maine, and offered us the business, why, we would unquestionably take it so as to maintain our contact with him.

Q. Have you sold up around Eastport in the last two or three years?

A. I don't believe we have ever sold up to Eastport.

Q. Did you bid upon any project up around Eastport in the last two or three years?

A. I would say not; no, sir.

Q. Did you bid on Passamoquoddy?

A. My offhand recollection is, I think we did bid once, on one of the smaller lots, but we didn't get any business.

Q. Well, if you had gotten the award—

A. We would have shipped—

Q. —you would have taken the business?

A. Yes.

Q. How far is it from your mill to Passamoquoddy?

A. I—I am not even sure how far Passamoquoddy is in Maine.

Q. What would the freight rate have been? You figured that, no doubt, when you put in your bid.

A. Oh, yes.

Q. Do you recall what it was?

A. I don't recall what it was.

Mr. Werle: Your Honor—

Q. What would your net have been?

Mr. Werle: —I would like to object to this line of inquiry for the reason that it has not yet been established what this company did bid on Passamoquoddy. I do not know whether they bid or not.

There is an exhibit in the record showing who the bidders were on some project up there, but this examination is proceeding on the assumption that this company did bid up there.

I think before we have a series of questions that we should have it established.

Trial Examiner Norwood: This witness just said he did bid up there.

Mr. Werle: No, he said,—I am not sure,—it seems to me I might have.

Mr. MacIntyre: He did say his recollection was that he had; he was not sure.

Trial Examiner Norwood: I understood that.

Mr. Werle: If that is clear, I have no objection; but I understood it otherwise.

Trial Examiner Norwood: Yes.

By Mr. Pardson:

28369 Q. Do you recall what your mill net would have been on the bid you put in there?

A. No, I am not.

Q. Would you sell to truckers today, Mr. Robeson?

A. No, sir; we would not.

Q. Did I understand you to say that you sell f.o.b. mill to railroads?

A. Yes, sir; we do.

Q. Did you make an f.o.b. mill sale to a railroad recently?

A. Yes—in other words, f.o.b. their line, not f.o.b. mill. We sell f.o.b. their lines at our mill.

Q. Their lines are at your mill?

A. Yes, we have two railroads we are local to, L. & N. E. and D. & L. W., and when we sell them we sell them f.o.b. their rails at our mill.

Q. Do you remember the date that you made your last sale to a railroad on that basis?

A. No, I don't, offhand. I would have no particular reason to remember it.

Q. What railroad did you sell recently?

A. It might be either one; might be D. & L. W. or L. & N. E., if we sold them this year.

Q. Do you recall?

A. No, I don't recall offhand.

Q. Do you have definitely in mind any sale to a railroad in the last two years?

28370 A. Well, I would say that we would have sold them if they had offered us an order. That's the only thing. I am not certain.

Q. Don't you recall whether you have had an offer from a railroad?

A. Yes, the Pennsylvania stands out in my mind. We sold them right along.

Q. Are they the one that has a siding at your mill?

A. No, sir; they are not local at our mill.

Q. Don't you recall having made a sale to any of the railroads that had a siding near your mill in the last two years?

A. One of the lines we are local to, you mean?

Q. Yes.

A. I would say, yes, that we—

Q. I am trying to find out, to see if I can refresh your memory, or recall to your mind some specific sale, so that we can talk more definitely.

Can you help me out?

A. Well—

Q. Do you know any? Did you have a sale to a railroad, that you have in mind?

A. Well, let me say this, Mr. Paulson, that the reason that I cannot carry all these things in my head, and having no particular reason to remember it,—but if the D. & L. W. or the L. & N. E. Railroad had offered us
28371 an order yesterday, we would have taken it and glad to get it.

Q. Do they tell you where they are going to use the cement?

A. No, sir; they do not.

Q. How do you know? How do you arrive at a price to sell them when you don't have the freight?

A. We don't. We don't know where they are going to take it; that's the reason why we sell them f.o.b. our lines right at our mill.

Q. That is, you make them a special price?

A. Not a special price, no. We make them a price right at our mill, because we have no way of knowing where they move it.

As I understand it, railroads move freight among themselves on some inter-company rate. I don't know that definitely, but that's an impression I have picked up in my time.

Q. What kind of a price do you make the Pennsylvania? Which doesn't have a siding at your mill?

A. The Pennsylvania Railroad we have to meet the competition of the prices that they have from companies whose lines they are local to. In other words, the Pennsylvania Railroad Purchasing Department gives us that information themselves, that is, tell us the price. We have a certain reciprocal relationship with them; we move a cer-

tain amount of tonnage over their lines, when they
28372 want to give us part of the business, but they make us take it at the price at which they can buy from other manufacturers.

Q. Well, in any sale to a railroad, you do not know where the cement is going to be used?

A. Not in the case of a railroad like those we have been talking about.

In the case of the New Haven Railroad, the New Haven Railroad will give you a delivery point, sometimes deep in their lines and sometimes at their nearest point to where they touch the connecting lines coming from our mill.

Q. Has it been your experience that prices in the cement industry in the territory in which you operate follow a pattern?

A. A pattern?

Q. Well, have you been able to find any standard by which you can understand the price structure in your sales territory?

A. Well, not always, Mr. Paulson. My first information on prices is at the destination, when there is a price move under way that's where we pick up our information. Now, then, our first step is to develop our information from our field men; they report back what they have.

28374 Q. There is no inter-relation between the prices at one destination and another destination?

A. Well, take the situation such as you have in New York City, where the lowest rate in the town would make the price. Now, there are other stations back in from low rate points even though our rates are higher to that point, we quote the same price at those points as we do at the low point; in other words, the low rate into the town would make the price into that town.

Q. All right.

Well, how about the rest of your territory?

A. No—

Q. In other words, is the price at Altoona, Pa., in any wise related to a town 50 miles away?

A. No.

Trial Examiner Norwood: Are there common factors in the prices as between the two?

The Witness: No, I wouldn't say so, offhand. In other words, I would have to find out what the destination price was at Altoona, and I would have to find out the destina-

tion price at the town 50 miles away, and then I could deduct the freight rate from Altoona to our mill; then I could tell what we would net there; then I could deduct that from other figuring points—

By Mr. Paulson:

28375 Q. Then you would know—

A. —before I arrived at such figure.

Q. Having done that, then you would know the price at various other destination points, wouldn't you?

A. Not necessarily. In other words, it would be a figuring point, but it wouldn't follow from—

Q. Hasn't your experience taught you that you can rely—

A. Not entirely so; it does follow frequently—

Q. Well, now—

A. —but the whole test—

Q. Is "frequently" the fair word there?

A. Beg pardon?

Q. Is "frequently" a fair word there to use? Isn't it almost a rule?

A. No. In other words, you will find—the true test of your prices at destination—

Q. I understand that.

A. —was, then—

Q. Do I understand you to say that the whole territory is covered with arbitraries?

A. No, no, no.

Q. They follow the pattern pretty well?

A. You might find at one period your prices in a territory relate to one figuring point, but that would be no indication that they would always relate to that figuring point.

28376 Q. I understand, but at any given time, six weeks, two months, three months' periods, don't they—isn't there a pattern obtaining in your sales territory, so that—

A. Why, I don't follow you on pattern. In other words, we have destination prices which work back to a constant at some figuring point. Now, knowing that figuring point, and surrounding the towns—in other words, if you had a town here to the west, and a town to the east of you, and you had a town in between, that were on the same freight rate, then I would figure that the destination price there would be the same as the two towns surrounding it.

Q. Well, you have base points in the sales territory in which you operate, don't you?

A. We have figuring points.

Q. And your practice is to find out what they are, and add the freight to determine the destination price, isn't it?

A. No, after I develop a figuring point, then the price that is used at that figuring point, that's the first test of what the price will be at destination; but it doesn't necessarily follow. I would have to test that destination out.

Q. I understand you to say now you test every destination in your territory?

A. No, not every one, except where we would be called upon to make a sale.

Q. Then you would have some pattern to follow, wouldn't you?

28377 A. I don't know as we can quite get together on it.

Q. Well, take—

A. Our field men know what their destination prices are in their territory. That's the first thing a field man does, he knows the destination price.

Q. When did you first start selling cement?

A. I first start?

Q. Yes.

A. Well, I started in the cement business in 1913.

Q. What were your instructions as to prices the first day that you went out?

A. I was going to say I didn't figure any prices in 1913; I was only about 17 years old.

Q. What were your instructions when they first sent you out in the field?

A. When I first went out in the field was about 1919.

Q. I see. Well, what were your instructions?

A. Well, my territory was in and around the metropolitan area of New York.

Q. Well, I see.

A. Long Island, Westchester County. My job was to find the destination prices out there, unless my company made the destination prices. My company initiated the change and put the destination price there, then I would know it.

Q. Did you ever sell in any other territory?

28378 A. Well, my experience was principally in that territory. I have on occasion been up in other territories.

Q. Did you travel any rural territory out of the metropolitan territory, I mean?

A. Yes, I would say over into Connecticut. I would go over there occasionally, yes.

Q. What were your instructions as to prices in that section?

A. Well, again, you would come back to the fact that there was a destination price at those points, and, again, by taking the freight, and if you work them back to a constant, at a figuring point, then we use that as a figuring point.

Q. Did you have a freight rate book?

A. I don't recall whether I did personally or not; no, sir.

Q. You don't recall whether they handed you a freight rate book the first day you went out?

A. Oh, you see, I went out on a territory that I had been in the office, controlling, for a long time, so—

Q. How many destination points in your sales territory are not tied to some base-point figure now?

A. Do you mean right now?

Q. Yes.

A. Why, I wouldn't want to be held to it—but may I have that again?

Trial Examiner Norwood: Read the question.

The Witness: And let us see if I understand.

28379 Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

Mr. Werle: That is objected to on the grounds that I think the witness cannot tell, and I certainly cannot tell, what it means, "tied to some base points."

Mr. MacIntyre: I think the question is clear.

Trial Examiner Norwood: I think so.

A. Well, I took it in its entirety, as relating back to some figure.

By Mr. Paulson:

Q. Why, yes.

A. I would say—this is a guess, I have never really applied a test to it—I would say that there would probably be 25 percent of the prices in the territory in which we operate in would be prices that did not relate back to a constant at some figuring point.

Q. How do you arrive at your percentage figure there?

A. Well, I just took a good running guess, that's all.

Trial Examiner Norwood: Well, is that what you call arbitrary?

The Witness: Yes, sir. In other words, that would be in what I would call arbitraries, or, in territories where the price in that particular town was made on a low freight rate, and the lowest freight governed, and then you ship to other points within that same city which carried a
28380 higher rate.

By Mr. Paulson:

Q. Well, what are these arbitraries in your sales territory now?

A. The arbitraries, as I recall them, are on Long Island, and in Westchester County. They are the two principal centers that come to my mind.

Q. Are the destination points everywhere else in the territory tied or related to a—

A. Are they related back to a constant?

Q. Yes.

A. I would say yes, that is my offhand recollection.

Q. Let me make that specific: How many changes have there been at destination points in your territory since January of 1939?

A. There has been none that I recall, offhand.

Q. Well, then, your salesmen have not sent you in a single announcement, have they? Have not picked up a single quotation, have they?

A. You mean this year?

Q. Yes.

A. There haven't been any changes that I have recollection of.

Q. You have not received a single notice or announcement of change in policy from your salesmen this year, have you?

28381 A. There has been no change, as far as I know, in my experience.

Q. And last year, how many were there?

A. Last year, that's 1938, I will say there was one, in the middle of 1938.

Q. Yes. Did that cover all of the territory?

A. Yes, it affected pretty nearly all of the territory that—

Q. Where was that change?

A. As I recall it, the Allentown Company initiated the change, and they issued quotations in Pennsylvania, reducing the price 10 cents a barrel at most of the destinations; more than that in and around Reading, and more than that in and around Philadelphia—and affected advances, made advances in the New York territory, and the Boston territory.

Q. How about 1937? Any changes then in your sales territory?

A. I don't recall any in 1937 that stand out in my mind.

Q. Then your salesmen were not very busy picking up announcements that year, either?

A. Oh, yes, in other words, our salesmen are around. A number of manufacturers do send out periodical quotations. Every salesman will send them in. I mean, they will come in.

Q. But your experience has taught you that prices in the cement industry are not a fluctuating proposition, are they?

A. Oh, they don't change from day to day, if that's what you want.

28382 Q. They don't change from year to year, either, do they?

A. Oh, I have been through a good many in my time.

Q. But you have Institute freight rate books, don't you?

A. Yes, sir; we do.

Q. Do your salesmen use those Institute freight rate books?

A. Some of them do and some of them don't.

Q. Isn't it true that if I had a list of the prevailing base-point prices, and a list of the Institute freight rate books,—I mean, a copy of the Institute freight rate books, covering your sales territory,—that I would know every destination price in your sales territory, except the arbitraries up there in Long Island?

A. No, I don't think you would know then. I think you would be able to take a figuring point, and on the last known information you had from the field, and you would develop a figuring point, you would reasonably suppose, not having heard of any change, that your price would be at least as low as the lowest price at destination, but you would have no assurance of it.

Q. I know. I know, but I would be safe,—I would be

using wise business judgment if I bid at any one of those points on that basis, wouldn't I?

A. Based on the last information you had from the field, yes.

Q. No, based on the sum of the base-point price plus the rate in the Institute freight rate book, wouldn't I?

28383 A. No, again, you would be just anticipating that your price would be as low as the lowest.

Q. Do you think I would go wrong? Do you think I wouldn't be as low as the lowest if I bid on that basis at any one of the destination points outside of Long Island?

A. You might not be.

Q. What do you think?

Trial Examiner Norwood: Ordinarily.

A. Ordinarily, I would say you wouldn't be, but you would have no assurance.

Q. Isn't that the way you reason?

A. No, not generally speaking.

Q. Isn't that the way you reason, Mr. Robeson?

A. No, not generally speaking. We know our destination prices at every locality.

Q. Aren't you wasting a lot of effort by having your salesmen going around like that—

A. They are around calling on the various people.

Trial Examiner Norwood: Wait a moment. One at a time.

By Mr. Paulson:

Q. I was just asking you if you are not wasting a lot of effort having your salesmen chasing around getting quotations when it has been your experience that the rates in the freight rate book added to the basing-point figure

28384 will give you the lowest combination of prevailing price?

A. No, but you are overlooking, Mr. Paulson, that a salesman's function—his function is to be out there every day—I hope that's what we are paying him for—to be out there and calling on all these people.

Q. Well, about all that your salesmen can help you with in the matter of picking up quotations, is giving you notice of a price change?

A. In giving us notice of any field conditions that we find.

Q. Yes. And the prices don't change at one destination

point in the cement industry, do they, in your sales territory?

A. Well, you might find one, but it is not frequent. Let us put it that way.

Q. They change in groups,—one group's relation to a basing point?

A. Well, when that manufacturer who is initiating an advance or decline,—he don't treat only one point, he treats the whole territory.

Q. He changes the base-point price?

A. No, no, he changes his destination price.

Q. Well, he changes his destination price by changing the figuring base that he uses?

A. Well, let me put it this way: He changes destination price and the result of the change of that destination
28385 price may result in his using a new figuring price to a new figuring point.

Q. But destinations shift in groups, and price changes occur at destinations in groups and not individuals?

A. Yes, that is true; and your freight rates move in groups. In other words, in my experience, I know of hauls that run from one end of the territory to the other; the freight rate would be absolutely the same.

Q. Are you a price leader in the cement industry?

A. We never initiate a price change; no, sir.

Q. How often do you and your other officials meet to establish prices in your company?

A. You mean in my own—my own officials in my own company?

A. Yes, sir.

A. Well, we have a board meeting once a month, and I report to them on conditions as I find them, what I think of the future prospects.

Q. Do you set out at the beginning of the year to establish a price for your product for that year?

A. No, we do not. In other words, we take the going destination prices and we relate it back to what we can make it.

Q. You really do not spend a great deal of time and counsel with your associates to determine the price at which you will sell your product, do you?

28386. A. Well, in the first place, as I say, we have board meetings once a month, and I am in touch with my superior, the president, at least once a week by correspond-

ence. I report to him on conditions as we have them at the mill, conditions as I find them in our sales territory, our shipments, what we are netting at the present time, what I think of the business for a coming period.

By Mr. Paulson:

Q. Do you discuss the price at which you will sell your product?

A. Why, yes, surely. I tell him what we are netting.

Q. You decide at those meetings as to the price you will charge at a given destination?

A. No. I decide that. That is under my authority.

Q. Well, as a matter of fact, you are a price follower, aren't you?

A. That is correct, yes.

28387 Q. And being a price follower you do not have to determine independently what price you will sell your product at, or for, do you?

A. Well, if you can—I can't hope to get any more than the lowest price at destination, that is the best I can hope to get.

Q. It is your function to find out what the other fellow is charging?

A. That is correct.

Q. And that you follow it?

A. Yes.

Q. When you find a change in price, Mr. Robeson, do you now—Let me ask you: What is the first—how do you get the first notice to your dealers?

A. Well, you have in mind we have a change of price in the field?

Q. Yes.

A. Well, we find a change of price in the field. The first jump would be our salesmen would notify the district manager—

Q. I say, how do you first notify your dealers after you have convinced yourselves there has been a price change?

A. It would all depend on whether it is an advance or a decline. If it were a decline, then, of course, after I made the ruling on it at Nazareth, the field force is instructed and the district office, by telephone, to ad-

28388 vise the dealers that we are meeting the price.

Q. I say, how do you give that,—how do you give that notice? By telephone, telegraph?

A. I do it by telephone to my district manager, who in turn instructs his field salesman; then at the same time if we can physically get the quotations out at night at Nazareth, then we mail quotations.

Q. Isn't that a sort of waste of effort, to issue quotations when the price in the industry does not change?

A. Well, if you are selling a customer and he is a valued customer, he likes to hear from you, what you intend to do by him.

Q. Well, you first notice, you say, is a contact by your salesman?

A. That is correct. That is after our instructions at Nazareth.

Q. And you send out your announcement as soon as you possibly can?

A. Yes, sir; I do. If we can get them out that day—if we can physically get them out.

Q. Did you hear of the price change in 1937 from the field or from a competitor?

A. 1937?

Q. I think you said there was a change in 1937.

A. I do not recall.

28389 Q. Oh, no. You said it was 1938.

A. 1938 there was one.

Q. Did you hear of that change in the field?

A. Learned of it in the field; yes, sir.

Q. For the first time you heard of that change?

A. The first time I heard of that change.

Q. You had no notion that there would be a change?

A. No, sir; I did not.

Q. That was pleasant news, wasn't it?

A. Well, it was not very pleasant that day, my first reaction—

Q. But don't you know any of the other cement men, manufacturers, selling in the trade area around New York?

A. I probably know them all personally; yes, sir; many of them are my close friends.

Q. You are all good friends?

A. A number are my personal friends.

Q. And you never discussed the change of price at all?

A. No. In other words, if a competitor had a move in mind, even though he were a personal friend of mine, I do not think he would tell me about it. He is still a business enemy.

Q. Well, he could not gain anything, why shouldn't he tell you about it?

A. Well, he may have his own reasons for not wanting to tell me about it.

28390 Q. Is he afraid of the law? Would you be afraid of the law to talk about prices?

A. Would I be afraid of the law to talk about prices?

Q. Yes.

A. That is a question I would rather go over with my counsel before I answer that.

Q. No, I am asking you.

A. Oh, I would say that you would not discuss prices with your competitors on any future prices. I would not feel there was any—

Q. But you had no information from your competitors, you say, as to the change of price at New York and Boston?

A. No, sir; we did not, no.

Q. What form was the notice in that you first received?

A. Well, the first information we had on it was from our district office by telephone from Philadelphia. There was a decline there, there was a substantial decline, and almost simultaneously we had the information from our New York district manager, called me on the telephone stating that they had information from one of our good customers around there that they had notices of an advance.

Q. Who made that advance?

A. That was Allentown. Allentown made the move, the declines and advance simultaneously.

Q. Is Allentown a big company?

28391 A. Larger than we are.

28392 New York, N. Y.,
December 8, 1939.

28394 H. B. ROBESON thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Paulson.

Q. Mr. Robeson, I believe you said your experience in selling of cement had taught that destination prices in the sales territory in which you operate are related to base-point figures?

A. I didn't say they were related to them. I said that the destination prices will generally work back to a
28395 constant figuring point, or figuring price at a figuring point.

Q. Now, when you get ready to send out your quotations, do you begin with that figuring point, or base point figure, add the freight rate and that becomes your quotation?

A. Well, it is not exactly that, Mr. Paulson. We begin in the field with what we find. If we find a sufficient number of quotations which work back to a constant figuring price at some figuring point, then we do use that figuring point and that figuring price.

Q. Yes, and then you add the freight rate.

A. Yes.

Q. To get the destination price that you will place on your quotation?

A. To get a destination price which we would assume to be as low as the lowest.

Q. Now, it is your object, is it, to meet the lowest price that is prevailing at any destination point?

A. The lowest price in terms of selling conditions at the destination price that we are satisfied is there.

Q. And to assure yourself that you will have your quotations at a figure as low as those of your competitors, you use what freight rate?

A. We use the freight rate,—the current freight rate.

Q. And where do you get that current freight rate?

A. We get that current freight rate from our
28396 freight rate book.

Q. The Institute freight rate book?

A. The Institute freight rate book which we are using; yes, sir.

Q. Well, what makes you think that the use of that freight rate will put you in at a price which is as low as those of your competitors?

A. We do not any more than if we use the actual tariff itself. In my experience the freight rate book we have reflects the tariff rates.

Q. Do you cooperate with your competitors in any way to publish these freight rate books or compile them?

A. We never had anything to do with the actual compilation. We subscribe to the service.

Q. Well, if you figure your freight rate from the tariffs and your competitors figure their rates from the tariffs, would your experience lead you to believe that there would be many discrepancies in the ultimate destination price?

A. I would not think that there would be. My experience has been that the freight rate books in all the years that I have been associated with them correctly reflect the tariff.

Q. Well, that is not exactly the question, Mr. Robeson. I said, would your experience tell you whether the destination prices made by the various manufacturers would be different if you did not have the Institute freight rate
28397 book? In other words, if you figured your freight rates independently and individually?

A. I do not believe it would bring any different result.

Q. Have you ever sold cement in the cement industry when you did not have an Institute freight rate book or some comparative compilation of freight rates?

A. Yes, my recollection is, and my experience with the Atlas Company, that they had their own freight rate books.

Q. Well, that does not quite answer the question; either. I say, have you ever sold cement in the course of your experience when you did not have the use of a compilation of freight rates made by some bureau or by the Institute?

A. Well, in my experience with the Nazareth Company, since I went there in 1924, we have always had freight rate books.

By Mr. Paulson:

Q. Furnished by some—

28398 A. Furnished, first, by the Nazareth Traffic Bureau, and after that the National Bureau, and then The Cement Institute.

Q. And then you really don't know whether or not there would be discrepancies if each company had figured the freight rates independently, do you?

A. Well, from that standpoint, I wouldn't know that if somebody took the tariff and didn't carry their per-barrel rate out correctly, when the hundredweight rate was given, then I wouldn't know, no.

Q. Are you familiar with the compilation of freight rates from tariffs?

A. Not personally, no.

Q. Do you believe that the freight rate books aid you in making prices as low as those of your competitors?

A. No, I wouldn't say so. The freight rate book is nothing more than a handy compilation of the tariffs, and, finally, the price that the customer has at destination is the test of the price.

In other words, if we make a price to one of our dealers, and we are high in price, if we had been doing business with him for a long time he would follow his usual principle of refusal,—he would say, "Are you interested in taking the business at this price?" and then we could easily elect to take it or forego.

Q. You are talking about something there that has
28399 never happened; isn't that so?

A. I don't have any particular recollection of one, but I think my relationship with my customers is such that—

Q. That has never happened, except in the arbitraries zones, has it—that condition you are talking about?

A. No, I can't recall any specific instance of it.

Q. Well, then, let us not talk about it. Let us talk about what the facts really are.

You told us yesterday that if I had wanted to get into a destination at the lowest figure prevailing there I would be quite safe in quoting the basing point plus the freight rate, out of the freight rate Institute book?

A. I don't believe—

Q. And I wanted to know if you thought I would be equally as safe in getting in there at the lowest price if I figured my freight independently, and used the freight rate that I computed out of a tariff from my tariff man,—is my question.

A. I think you would, and I imagine, on my experience, I think you would. After all, the freight rate book merely reflects the information that is in the tariff.

Q. I am trying to find out whether your experience has taught you whether or not computing rates from tariffs is a difficult matter.

A. I wouldn't say it was a difficult matter, having watched my people who are familiar with tariffs; it
28400 is just one of time consuming, that's all.

Q. Does the diversion of shipments in transit have a tendency to cause destinations to become disassociated and unrelated to basing points?

A. Let me see if I can answer that.

As I see it, with my experience, if we make a sale to a customer at one point at a price—that is, if we consummated a sale at that price, and he was to divert that, so he would be able to get away from his original understanding with us, where we had consummated the sale, then I would feel, yes, that he was being able to buy at a lower price, or getting advantage of a price that we were not willing to make at that destination.

Q. Well, your answer to the question, then, is "yes," isn't it?

Mr. Leisure: No, I don't think—

The Witness: May I have the question?

Mr. Leisure: Yes. It appears very plainly it is not a question that can be answered "yes" or "no."

Trial Examiner Norwood: He may answer and sum up his answer if he wants to.

The objection is overruled.

The Witness: May I have the question by Mr. Paulson, please?

Trial Examiner Norwood: Read it.

28401 (Last question read.)

Trial Examiner Norwood: Do you want to read his answer up to that point?

(Last answer read.)

Mr. MacIntyre: Your Honor please, I submit that it is not an answer to the question. The question calls for a direct answer as to whether or not that these destinations do; under such circumstances, become disassociated with basing points and basing-point figures.

Trial Examiner Norwood: Well, now—

Mr. Leisure: The witness answered it.

Trial Examiner Norwood: There is no use discussing that. The cross-examiner asked him then if his answer was "yes." We are waiting for his answer to that.

A. Well, I would say again, on my experience, that it was not so. I would say with my own particular experience the majority of diversions I have been concerned with in my experience have been in the so-called arbitrary territories.

By Mr. Paulson:

Q. Well, you are limiting the answer. You say the answer is "no."

A. I would have to answer your question specifically "no," then.

Q. That diversion in shipments does not throw the destination point to which the shipment is diverted off
28402 the basing-point formula?

A. Well, you are going on the premise that we use a basing-point formula, and I do not go along with you on that.

Q. Well, I will use your terminology, but we have agreed that you have some figuring point, and that you add the freight rate.

A. We have a figuring point.

Q. I am just asking you if diversion of shipments in transit does not cause disruption of that so-called pattern or arrangement and relation between basing point and destination?

A. Well, again, I am only answering you with my, Mr. Paulson—in my own experience. I said diversions I have been associated with in my experience has been in the arbitrary territories.

Q. You have not heard of any diversions other than at arbitrary territory?

A. None that comes to my recollection.

Q. There is very little diversion of shipment in transit; isn't that correct?

A. Very little under present conditions, yes.

Q. Well, when it was more prevalent, what was your observation?

A. Well, again, those diversions were in the arbitrary territories, the ones that come to my recollection.

Q. Well, with your thorough understanding of
28403 the price structure of the cement industry, can't you tell me whether the answer to my question should be "yes" or "no"?

A. Well, I would say "no," if pressed for a specific answer.

Q. Well, I expect we will have to go through the illustration of it, then.

Take basing point, use Northampton as a figuring point, and think of Point A with a freight rate of, well, take point A and think of Point B. If a man buys for delivery at Point B and diverts it to Point A, what happens to the price at Point A?

A. Well, there is one more factor there, Mr. Paulson, that is the freight rate from your mill to the two points involved.

Q. Well, he is not going to divert unless by the diversion he is going to get the cement at a lower figure at Point A than he would if he bought for delivery there.

A. No, that is not the point.

Q. Isn't that why they divert?

A. No. One of the principal problems of diversion we have had is a dealer diverting our brand into another market where we would not sell him. He would ask us, "Will you sell me?" We would say "No, we got a good customer there."

Q. Don't you have diversions in transit for the other reason; namely, that they can buy it at one point and take advantage of routing and get it to another point at a
28404 price lower than the one you are quoting at that second point?

A. However—

Q. Well, answer that. Don't you have that experience?

A. Well, I am running ahead of you, I think.

May I have that question, again?

Mr. Paulson: Read the question, please.

(Question read.)

A. Yes, we have had diversions of that type.

Q. Now, wouldn't that type of diversion throw that second point off, throw it out of relation with the basing-point price?

A. No, again, Mr. Paulson, that type of diversion would be more apt to take place in an arbitrary territory.

Q. Well, answer the question.

Trial Examiner Norwood: He did not ask you that.

By Mr. Paulson:

Q. Wouldn't it throw that second point to which the car was diverted off its base point plus freight basis?
28405 A. Well, coming back to your hypothesis, I think that is the word for it.

By Mr. Paulson:

Q. No. You had agreed that you had experiences with that sort of thing. It is not a hypothesis any more.

A. I only agreed, Mr. Paulson, the ones that come to my recollection are in the arbitrary territory.

Q. You have never had experience with that sort of diversion outside of an arbitrary territory?

A. I do not recall any; no, sir; a diversion which would affect price in our original sale.

Q. Then we will have to go back to the hypothesis again. You say you have not had experience with one, and then considering it to be hypothetical—but the record shows that there have been such diversions—and I am just asking you, wouldn't that destroy the relationship between—

A. Well, starting as we said from a mill, and the sale originally consummated at Point A, the dealer after having purchased that car at Point A then diverted the car to Point B, the question of whether or not the dealer can gain any monetary advantage by doing so would be where there was a difference in freight rate between those two points.

28406 Q. Yes. I understand. I have asked you now whether situations haven't presented themselves.

A. Let me answer it specifically, then: If there is no difference in freight rate between the two points, the dealer has no monetary advantage.

Q. And if there is a difference, so that the difference would enable him to save some—to get the cement at a price lower that what you are quoting at that second point, then what?

A. Well, if he were to divert the car from a point where, for the sake of argument, where his freight rate was 40 cents a barrel in the first instance—

Q. Yes.

A. —and he diverted that to a point where the freight rate was 36 cents a barrel, then he would have a monetary saving after he had deducted his cost of diverting the car. There is a charge for diversion.

Q. That would destroy the relationship that existed between that destination point and figuring point?

A. I do not know that it would destroy the relationship, but he would be getting cement for less cost than he agreed to purchase it when he consummated the sale.

Q. Well, isn't that, that the relationship would be destroyed there?

A. No, I would not say so. After all is said and done it would be something—he would be sort of a sly act;
28407 in other words, it would be something you would not find out about unless you were specifically tracing the car through.

Q. But the combination figure base point plus freight would not control that destination to which he could divert while he was diverting, would it; he would be able to sell all the cement in that town, wouldn't he?

A. Well, it would all depend upon the relationship of the freight rate. Now, you do not have wide-spread freight rates of that sort.

Q. No, but with the illustration that we talked about.

A. Well, he would be getting cement for less money than he agreed to purchase it in the first place.

Q. That is one of the reasons you do not like diversions of shipments, isn't it?

A. That is one of them; yes, sir.

Q. Trucking has that same effect, doesn't it,—trucking? The transportation of cement by trucking has the same effect; namely, to destroy the relation of destination price to base point?

A. No, trucking might, depending upon the distance that the truck is going. It might give a purchaser a lesser destination cost or it might give him a higher destination cost.

Q. It has a tendency to disassociate destination points from base price, doesn't it?

A. Not from base prices, I would not say. It
28408 could have the effect of in some instances giving a purchaser a lower destination cost.

Q. Well, that disassociates it from the norm which is base price plus rail freight?

A. It would be lower than his destination cost, what we offer to sell him carload lots at that point.

Q. But it disassociates from the norm, which is base-point figure plus freight rate?

A. Well, we do not have a meeting of the minds there.

Q. Well, you have agreed with me that that is the norm in the industry. You have agreed with me, I believe—I will ask you again, however, if it is not true that the normal thing in the cement industry, in the sales territory in which

you sell, is to find destination prices which are the lowest combination of a base point or figuring point price and the rate in the Institute freight rate book? You have agreed—

A. Well, so long as you would go along with me that it is a figuring point and not a base.

Q. All right. But you will agree with me that that is the norm in the industry; isn't that true?

A. I would say, as I testified yesterday, probably, if I remember my figures, about 75 percent of the area or the tonnage that we move.

Q. Well, percentage figures would be a question of what you use for basing material, whether you figure it
28409 by tonnage or whether you figure it by destination points. As to destination points it is higher than 75 percent, isn't it? In other words, the rule—

A. Yes, as to destination prices it is probably higher than 75 percent, and as to tonnage it is probably greater than 25 percent.

Q. Well, now, I will ask you if trucking, like diversion shipments in transit, does not tend to cause departures from that norm?

Mr. Leisure: Well, now, the witness hasn't said that it was a norm. He has pointed out the difference in carload shipments and truck shipments; so, to include in the question "from that norm," that is quoting something that the witness has not said and is not in the record.

Trial Examiner Norwood: I do not think the question necessarily purports to quote what the witness has said. If he does not understand what "norm" means, he can say so.

The objection is overruled.

The Witness: May I have the question again, now, please?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. Well, I would have to do some speculating there.

Mr. Paulson. We haven't had any trucking out of
28410 our plant for seven years, or more.

By Mr. Paulson:

Q. Well, where trucking prevails, you cannot assume that destination prices will be base-point figure plus rail freight, can you?

A. I don't recall that we specifically compete in a territory where there is trucking.

Q. Well, you have had experience with it, though? What was your—

A. Well, not in recent years.

Q. Well, up until 1931.

A. Yes, 1932, yes.

Q. You have had—

A. No—

Q. —I would ask you—

A. I would say, again, as I said before, that the factor of distance comes in there, and short-haul runs, where there is a possibility that your trucking rate, trucking cost, would be lower than a freight cost at that destination; then, assuming for the sake of argument, you were selling the cement at the mill at your maximum net, and that rail shipment also nets you your maximum net, then I would say that there would be the possibility in some territories, although I am not familiar with trucking rates, myself, as they are today—there might be a possibility that a man might be able to develop a lower trucking cost, mill-
28411 cost, by trucks, than he does by rail.

Q. Transportation of cement by truck causes instability of price at destination points, doesn't it?

A. Well, I don't follow you instability. Instability as against what?

Q. Well, it renders the market price—using "market" in the sense that you do, at destination points to which cement is being trucked, an unknown or indefinite quantity, doesn't it?

A. Well, you would merely have new competition; in other words, in order to—

Q. Now, answer that; doesn't it? "Yes" or "no."

A. Well, it might, momentarily; that is, the moment somebody started trucking—

By Mr. Paulson:

Q. Well, it places it—

A. There might be a departure, we will say, using the same phraseology, from a price that we were making the day before, f.o.b. cars, at that point.

However, it is still our custom—there is a customer involved at that point, our field experience and our relationship with him teaches us to go and find out what is
28412 his cost, what have w to meet,—again, we have the problem that we will, again, if we want to stay

in the market, we will have to meet the lowest price that he has got.

Q. But it is more difficult to ascertain lowest prices of competitors when trucking prevails than when sales are made exclusively by rail?

A. Well, it adds to your retail problem, because the tariff rates are available to anybody, and the trucking rates are anybody's guess, to some extent. That is, that was my experience prior to, say, 1932—that is, one trucker would figure his cost so and so, and the other fellow would figure his cost so and so, but you had an impact of competition that eventually got to the point where you had to say, "Yes, we will take it at that figure," or "No, we won't."

Q. Well, did that fact have any influence upon your abandoning of the transportation of cement by truck?

A. No, sir; not in our case, it didn't; no, at no time did the amount of cement moved from our mill amount to more than 2 percent by truck.

Q. The certainty of prices at destination points is of no advantage to you?

A. Well, yes, it is an advantage from the standpoint that we have got our men in the field every day to make certain that we have our fingers on the pulse of the market. We would have to be—

28413 Q. Yet you say when trucking tends to make it almost impossible to know what the lowest price is at destinations,—you say that that did not influence you in wanting to—

A. It would be one of the factors, but not the controlling factor.

Q. No, no, I didn't ask that. I just wanted to know if it wasn't one of the factors.

A. Yes, yes, I will concede it is one of the factors.

Q. Won't you concede, also, that the impact of foreign cement has the same tendency, as trucking of cement, and diversion of shipments in transit?

A. No, I don't see any relation between the two, and—

By Mr. Paulson:

Q. All right. Are you through?

A. Well, I don't see any relation between the other two points we have been discussing.

Q. Well, on that point of so-called stability in destination prices, aren't those three things on a par—

A. No.

Q. —foreign cement, tracking, and diversion of shipments in transit?

A. No. You see, in each one of those cases there are other elements concerned, and diversion is the element of our relationship with our customers.

Q. Oh, yes, they are not on all fours with one another.

A. All right.

Q. But they have that in common, do they not?

A. That they—

Q. That they tend to render—

A. No.

Q. —it difficult to ascertain and know the lowest price that is being quoted at the destination price?

A. Well, that certainly isn't true with regard to foreign cement.

Q. Well, do you know when your foreign cement is in competition with domestic cement, what the lowest price for—

A. No.

Q. —foreign cement at a given point is?

A. You mean for foreign cement?

Q. Yes, or—

A. No, we don't, and we are not interested in it, in a sense, except an academic interest; in other words, we can't hope to—

8415 By Mr. Paulson:

Q. You have to keep your prices somewhat in line with foreign cement, don't you, though?

A. No, we couldn't hope to compete with them.

Q. Well, I say, you can't have your price too far above theirs, can you?

A. Well, you have reference now to the Nazareth Cement Company, of course?

Q. Yes, we are talking about them.

A. Well, as far as the Nazareth Cement Company is concerned, we would ignore foreign competition. We attempt to defeat foreign competition by bringing home to our dealers the advantages that he would have when he is doing business with us.

Q. You did not feel so happy about the action taken by your competitors, then, in reducing prices to meet foreign competition, did you?

A. I wasn't very happy about it, no.

Q. You would have sooner—

A. I would have sooner fought it out on a basis that I am willing to fight it out today.

Q. But you did follow because your competitors—

28416 A. That's different. In other words, a domestic competitor, offering these advantages that we have at a lower price, then we must meet that or forego the business.

Q. But the effect of foreign competition is to cast sort of a robe of insecurity and instability about prices at destination points, is it not?

A. No, I wouldn't say that it casts any instability. After all is said and done, we know the price that we want to sell at, and we continue to press home the advantages that we have.

Now, I would say this. This is my observation as a cement man, that a continued impact, heavy impact of foreign cement at prices far below what we could attempt to meet with our American costs, naturally has a pressure on your market, but it would be a—

Trial Examiner Norwood: Well, I think the question went more to the confusion as to what prices were, rather than whether the market was depressed.

Mr. Paulson: That is correct, Your Honor.

Trial Examiner Norwood: Can you answer it from that standpoint?

A. Well, if, for the sake of argument, we had domestic competition who were making a price here, there, and the other place, to meet foreign cement, so that we would have to keep feeling the market every moment, of the market—

28417 By Mr. Paulson:

Q. Yes.

A. —we might have a little different situation.

Q. Well, it does,—foreign cement being on the market,—does have a tendency to make you—put you in a position of having to feel that market more often, doesn't it?

A. Well, again, as I say, we are primarily interested —we, the Nazareth Cement Company, are primarily interested in our domestic competitors.

Q. That is certainly to your advantage.

Trial Examiner Norwood: That does not answer his question.

The Witness: Well, I am doing the best I can with this.

Mr. Werle: If Your Honor please, I submit it does. There isn't any one of these questions that does not call for an economic discussion, not directed to the facts at all.

How can the answer be any other way,—talking in abstract terms all the time.

Trial Examiner Norwood: Read the question and answer.

(Last question and answer read by Reporter.)

Trial Examiner Norwood: He is not asking for any economic discussion whatsoever. He is asking him
28418 for the factual matter of whether, in these foreign cement fields, he has to feel out the market more often.

Mr. Paulson: That is correct.

Trial Examiner Norwood: Now, is that right or not?

The Witness: Not entirely, Your Honor, that we do—we are in every market every day of the week.

By Mr. Paulson:

Q. You do not have to feel out the market where foreign cement is in the market more often than you do at some rural territory—

A. No.

Q. —which has been on a base point—

A. No, because we have, as I said before, we have never attempted to compete with foreign cement, as such. We are interested in the matter of outlets. It is a matter of effect on our business. The salesmen visiting the dealer tries to pick up what information he can.

Q. What caused you to go to Lehigh Company and get their prices?

A. The Lehigh prices were in the field. You only went there as a matter of convenience. I could check everything Lehigh did in the field, but I was away from my office that morning by reason of having stopped at Easton.

Q. It is to your advantage, is it not, as a manufacturer and distributor of cement, to have prices openly
28419 announced by your competitors?

A. Why, I don't know whether there is any advantage particularly. We would develop the same infor-

mation in our contact with our customers. You see, these customers of ours handle five or six different brands of cement, and we have to be continually meeting the lowest price we have, or we just have to forego the business.

Q. You cannot meet something you don't know, can you?

A. It would be just a matter of making the dealer show us what he had.

Q. Knowing enables you to meet it, doesn't it?

A. No, we would also know if the dealer were buying on any other basis, if he showed it to us.

Q. Have you found any dealers who misrepresented prices?

A. Oh, they do, but they don't show them to you.

Q. Well, it is a fact—isn't the fact that you desire to meet the lowest price in the field one of the reasons why you support the Institute?

A. No, sir; I don't believe the Institute—I don't feel that the Institute has anything to do with our prices in the field.

Q. Well, the Institute gets out the freight rate books, doesn't it?

A. That is merely a matter of freight rate service.

Q. The freight rates are very convenient in meeting the lowest—

28420 A. No, only convenient in having a ready tabulation, and having the information that is also available in the tariffs.

Q. You say that they are of no assistance in meeting the prices of your competitors?

A. No assistance from that standpoint, no. In other words, we could develop the same information from a tariff. My feeling about a freight rate book is the same that an interest table is of use to a bank clerk.

Q. You used the Young compilation of freight rates, and they were not accurate with the tariff, were they?

A. Well, they were accurate with the tariff, as far as they went.

Q. But you used them in making your quotations, and yet you knew they were not accurate in many instances?

A. Well, I would say, offhand, I don't have any specific recollection of—

Q. Well, you said on the stand on direct that the National Bureau which operated just prior to the organization of the Institute, published inaccurate rates.

A. I didn't say that.

Mr. Leisure: No, no, no such testimony as that.

The Witness: I doubt that.

By Mr. Paulson:

Q. Well—

Trial Examiner Norwood: You did not say that?

28421 The Witness: No, sir.

By Mr. Paulson:

Q. Well, why was the service unsatisfactory?

A. Oh, it was the general custom; in the second place, his corrections were slow in coming through, as I recall it.

Q. Well, they were incorrect?

A. No, they were not, after all is said and done; you get the same information from a railroad, that where a correction is coming through, an adjustment of a tariff, the information is well known.

Q. In the sense that the National Freight Rate Bureau freight rate compilations did not keep up to date, they were in error, were they not?

A. No, I wouldn't conceive they were in error in that sense.

Q. Well, if the rates they published did not correspond with the prevailing rates, the rates in the book were wrong?

A. Well, yes, but you would make those adjustments internally in your own staff.

Q. Then, you had a freight rate service of your own while you used the National Bureau's?

A. Not a freight rate service. But you have a shipping department who have the tariffs and who get all the information from the railroads of the change in tariffs.

Q. Do they check each and every tariff?

A. No, they do not check each and every tariff—

28422 you mean in the book?

Q. Yes.

A. No. They might make certain tests; I do not believe they check each and every rate.

Q. How would they know when the rate in the National Freight Rate Bureau Book was right or wrong when they did not check every one?

A. Well, I do not say they were wrong.

Q. Well, you said they were not up to date sometimes; how would you know which were not up to date if you did not check every one?

A. Well, again, going by the experience, I know that if, for the sake of argument, you have a published notice of a change in freight rates effective such and such a day, and that information is known, these changes—as I say, I am not a tariff man—but I believe these changes are made on about a 30-day notice.

Q. Well, you use those National Freight rate compilations?

A. Beg pardon?

Q. Well, you use those National Freight Rate compilations—National Freight Rate Bureau compilations to quote prices, did you not?

A. Yes, yes, we would, yes. We would use them as our basic data.

Q. One of the reasons you use the Institute
28423 freight rate books is to quote prices which will equal the lowest price quoted by competitors?

A. We do not use them to quote prices. The prices we have are in the field, that is where we find the price.

Q. Well, it sounds to me like that is a change in testimony from what you said yesterday.

A. No. I think I have been consistent on that.

Q. Didn't I understand you to say yesterday that you found prices in the field, took them back to some base-point figure, issued quotations in that territory by adding that figure, and freight rates together, the freight rates it took from the Freight Rate Institute book?

A. That is not exactly my words. We find the quotations in the field, and we check them, and if they relate back to a constant figure at a figuring point, then as long as we have that information, that is the last information we have from the field, we feel that we are reasonable in using the last information we have that our price will be as low as the lowest. We are not sure it will be.

Trial Examiner Norwood: Now, in quoting other points from the one where you pick up the price, would you use that constant figure, then, plus freight, in quoting other points in that territory?

The Witness: Well, Your Honor, when you pick up these quotations you pick them up over a wide area.

28424 Trial Examiner Norwood: Yes.

The Witness: In other words, most of the territory we operate in is a concentrated active shipping, repeat shipments.

Trial Examiner Norwood: Then, you have never quoted at a point where you have not actually picked up the competing price?

The Witness: Oh, yes, sir; we do. We do on occasion; yes, sir.

Trial Examiner Norwood: Now, when you do that you use this constant figure that you have arrived at by deducting the freight from other points in that territory to figure the price, the particular price?

The Witness: That would be one way of doing it. The other way, as I explained the other day, you have got particular isolated points, you pick up—you might have that surrounded on the same rail by two other towns.

Trial Examiner Norwood: That is the common freight rate?

The Witness: Common freight rate.

Trial Examiner Norwood: And that would be assuming that that is the same figuring price obtaining in the similar locality?

The Witness: Yes. In other words, you have no assurance that it would, but you anticipate your price
28425 would be as low as the lowest.

Trial Examiner Norwood: Assuming that it did.

The Witness: That is right.

By Mr. Paulson:

Q. That is, adding the rate in the Freight Rate Institute book to that figure gives you the destination price?

A. On the last known information you had, I would assume my price or anticipate my price would be as low as the lowest at that point. I have no assurrance of it.

Q. No. But you would assume that is—if you added the rate in the freight rate book.

A. No. I got at the figuring price—at the figuring point.

Q. Now, we are back where we started from. You made that statement in your previous statement?

A. No.

Q. I had to straighten it out again.

Now, what I have been trying to find out is whether the

fact that you and each of your competitors using the Institute freight rate book does not make it more easy for you to meet each other's prices?

A. No.

28426 By Mr. Paulson:

Q. Well, can you answer the question?

A. Well, I would want to say first, in the first place, I have no knowledge that all my competitors are using the freight rate book, and I do not feel under any compulsion for the Nazareth Cement Company to use the freight rate book. I merely use it as a matter of convenience to my company.

Q. You are not under compulsion to do anything in the operation of your business, are you?

A. Not while I have my own free will and I am running the Nazareth Cement Company; no, sir; outside of legal regulation.

28427 Q. But you are anxious to cooperate, to keep certain conditions in the industry, aren't you?

A. No. My principal interest is to be competitive at all times.

Q. Would you deliberately go out and cut prices?

A. I never have; no, sir; never have been a price cutter.

Q. Aren't you interested in maintaining stability in the markets,—your definition of markets as destination prices?

A. My principal interest always is to be competitive and to be in there all the time.

Q. Well, isn't it one of your interests to keep stability in those prices prevailing at destination points?

A. I do not follow you on stability. Do you mean keeping them constant?

Q. Yes, keeping them constant.

A. No. My prime interest of the Nazareth Cement Company is to be in there as low as the lowest.

Q. Do you allow diversion of shipments in transit?

A. We do not; no, sir.

Q. Do you permit trucking?

A. We have not permitted trucking from our mill since 1932, no, sir.

Q. Those are two things which would tend to render markets unstable, aren't they?

A. Not unnecessarily so. As we said before, I went

over that with you before; I did not feel that
28428 they—

Q. Do you have a dealer policy which is on all fours of those of your competitors?

A. Well, I would not know all my competitors. As my field experience, I would say the policy that we have is satisfactory to our dealers, and they continue to buy from us; we develop good will from it.

Q. I will have to ask that you answer the question definitely. Now, that question was not indefinite. I said, isn't your dealer policy on all fours with those of your competitors?

Mr. Werie: I submit the question was answered. The witness said, "I do not know what the dealer policy of all my competitors is. It is satisfactory to me and my dealers. What more do you want?

Trial Examiner Norwood: Let him answer it again.

By Mr. Paulson:

Q. Do you know of any competitor's policy, dealer policy that varies from yours?

A. Not unless I took them and compared them letter by letter.

Q. Well, do you know whether they vary?

A. It may be, in my—do you mean in my field experience?

Q. Yes.

A. I would say in my field experience that they probably are similar to my policy.

28429 Q. Well, you have told us on direct and on cross, both, that you keep your staff of salesmen constantly checking to be sure that you are abreast of the market. You must know dealer policy, then, and you do know dealer policies of your competitors, don't you?

A. Yes, I do to this extent, that where a competitor announces a policy I assume he is staying on his policy.

Q. You know the policy, don't you, of each and every one of your competitors?

A. I know his announced policy but I do not know, except as I develop it, from field information if he makes an exception to his policy.

Q. Don't you know the announced policy of each and every one of your competitors?

A. I would not say that I know the policy of each and

every one of my competitors. It would be the more important competitors.

Q. And your announced policy is on all fours with those with which you are acquainted?

A. As far as the ones that specifically come to my attention, and where I check them, I would say that they are on all fours, as you put it.

Q. Do you do anything in marketing your product which is different than what is done by your principal competitors?

28430 A. Do you mean with regard to our announced policy?

Q. Yes.

A. We do not deviate from our announced policy.

Q. That does not quite answer the question. I am asking you, do you do anything—offer any advantages your competitors do not offer?

A. Well, as I said, I do not know of any other way to answer that. We have a policy—we announce that policy and we stay with that policy.

Q. Now, I am asking you, do you offer any advantages to a purchaser of cement that your competitors do not offer?

A. Well, we offer them the service and the advantage of dealing with our company, which we feel is worth something.

Q. Outside of that, do you have?

A. No, I cannot think offhand.

Q. And yet you say that you—and yet notwithstanding that you quote on an identical basis with your competitors, you are not interested in the stability of the market? Would you say that you are not interested in maintaining stable markets,—the market prices or prices at destination points?

A. No, I say this? I say—

Q. You are interested in that, are you not?

A. I say we are constantly maintaining our position, that we will be as low as the lowest, and our terms and conditions will be as favorable as the competitors that our customers are purchasing from.

28431 Q. What is your purpose in paying dues to an Institute?

A. Beg pardon?

Q. What is your purpose in paying dues to an Institute?

A. Well, in the first place, the Institute renders this freight service, and the fact that we have been in the Institute ever since it started.

Q. Doesn't the freight service lend stability to the markets?

A. No, I don't feel that a freight rate book is anything other than a compilation of information that is in the tariff.

Q. Well, I agree with you as to what it is.

I am asking you, doesn't the service lend stability to the cement market, the market for cement? Isn't it your experience that it does that?

A. No. In other words, the stability of the cement market—

Q. Doesn't it tend to throw instability into the market?

A. No, I do not think it does.

Q. It does not affect it in any way?

A. I do not believe it does.

Q. Do you think if there were not any in existence,—those freight rate books,—those market prices would be as stable as they are now?

A. I would say you would still have a situation—

Q. Now, answer that question: Would you say that they would be as stable as they are now?

28432 A. You keep using the word "stability." I am talking about a market at the point where we, as the Nazareth Cement Company, we will meet the lowest price of a competitor.

Q. And by "stability" I mean absence of fluctuation in prices at those destination points.

A. Well, that word "stability," as you use it, gets you into the field of economics.

Q. Do you think that you and your competitors would submit as many identical bids if the freight rate books were not available to you?

A. I do honestly believe so, yes.

Q. In other words, if you figured your freight rate independently, and Alpha figures its independently, and Lehigh figures its independently, the chances are that you would all figure the same freight rate?

A. Coming off the tariff, you are bound to. It is a matter of multiplication.

Q. Have you ever tried to figure a rate from a railroad tariff?

A. Have I? No, but we have trained people that do it. I have not personally, no.

Q. Have you ever submitted a notice to the Institute that one of their freight rates is wrong in the book?

A. I have said, to my recollection, I have never found an error in the freight rate book, or anybody on
28433 my staff.

Q. You know that the book has contained errors?

A. I have read that in the transcript.

Q. And you know that many companies have sent notice to the Institute that in figuring freight rates they arrived at a different conclusion?

A. I have read that.

Q. And yet you say you think they have no influence in the making of identical prices?

A. No. Pressing me for an answer on that basis, I say in our experience we have never found any errors in the freight rate books, and, as I read the record, I would say that the points where these supposed-to-be errors were, they were isolated points where nobody had any occasion to use the rate. That would be my interpretation—that would be my impression of reading it.

Q. No, but you answer that you have read, and you know that Mr. Apgar of Alpha, I believe, has notified the Institute that it has arrived at one freight rate by figuring it, which is different from the rate figured by Mr. Reiter in the Institute offices; you know that, don't you?

A. I remember reading the record, yes.

Q. Well, in that instance, if Alpha quoted the price which it figured, and you quoted the price which you figured—supposing you had figured the one the Institute had figured—you would not get identical bids, would
28434 you?

A. Well, let me say this: I do not remember the particular instance, that is the point involved, but keeping in mind the freight rate area that I am located in, we are in constant repeat juice all the time.

Q. As I understand, your situation is a little different with regard to your being located where you are, but I want to ask you in that connection, can you use the freight rate books for billing purposes?

A. We do; yes, sir.

Q. And, are they adequate?

A. Yes, they are adequate for our purpose; yes, sir.

Q. You have no necessity for routing information that you can't get from the Institute books?

A. There is no routing information in the Institute books.

Q. Don't you have necessity for routing information?

A. No, your routing information to your shipping clerks would be constant daily use, something they learn by rote, memory.

Q. You have to get the information elsewhere than the Institute books in order to bill your shipments, do you not?

A. Well, I previously testified to that effect, that we use our freight rate book for billing.

Q. Wait a minute. That is what I am asking you. You can't use it exclusively for billing?

28435 A. Yes, you can.

Q. Where do you get your routing information?

A. Well, your routing information you know.

Q. Well, everything is not in the Institute book, is it?

A. Beg pardon?

Q. Everything is not in the Institute book, is it?

A. No, no, I will grant you that.

Q. Then, you do not use the Institute—they are not adequate for shipping purposes, are they?

A. Well, for our purposes they are, yes.

Q. Because they supplement what you already know.

A. Well, what experience we require.

Q. Well, those rates in the Institute book, as I understand it, are hundredweight rates on cars of minimum cars, 132 barrels up to 40,000 pounds?

A. No, that is 50,000 pounds, 132, and then upward.

Q. I see a rate in the rate book is published, too. Is that rate on a minimum car under the railroad tariff?

A. That is the tariff, yes.

Q. What do you do for a rate if you ship over the minimum car?

A. Well, the freight rate prevails for everything above. It is a minimum.

Q. It is not a hundredweight, doesn't the hundredweight change if you ship an 80,000-pound car?

28436 A. No, the hundredweight rate itself does not change.

Q. I was under the impression our expert witness on tariff had testified that they did. Are you sure of that point?

A. Well, see if we understand one another. If we understand one another—

Q. Well, is there only one hundredweight rate between two points involved in the shipment of cement?

A. So long as you ship above the minimum, yes.

Q. But below the minimum, then what?

A. If you ship below the minimum then you begin to get into class rates, I believe.

Q. Where do you get those rates?

A. You have to call the railroad for less-than-carload rates, if it is a less-than-carload shipment.

Q. In that instance the Institute books are of no assistance to you?

A. Well, you never have occasion to ship that way.

Q. You do ship cars running up to 80,000 pounds?

A. Oh, yes; nowadays you can ship cars.

Q. Well, you do do it, don't you?

A. Yes, we—

Q. Well, that is all I want to know.

A. O. K.

Q. But I do want to know whether or not you compute in your office the freight rate applicable on each and
28437 every one of your shipments?

A. Yes, we do; yes, sir.

Q. Why do you do that?

A. You do that in your billing. You have to, to make out your bill-of-lading and your invoices.

Q. Doesn't the Institute book—

A. Oh, I see. You said "compute." I had in mind we take it off the Institute book and we put it in there for the proper destination.

Q. Now, I want to know, do you compute each and every one of those rates exclusive of that operation?

A. Do you mean go back to the tariff and figure?

Q. Go back to the tariff.

A. No, we do not; no, sir.

Q. In other words, you rely on the Institute book for the correct rate and accept payment from, or accept the charges made by the railroads on that basis?

A. Well, we do two things. We use the Institute freight rate book for our billing, and then we file our bills-of-lading

with the railroad that night, which we must do. Now, then, they got to sign the bill-of-lading. They return the original bill-of-lading to us.

Now, if they find for the routing we use—if they find that they won't protect that rate then they immediately call up
28438 our people on the telephone, and our people would say, "What is your authority fo it?" and then they would give them the tariff authority, and they would work it out between them. But that is a definite procedure in our organization, that we use the freight rate book, and we put the billing per hundredweight on that bill-of-lading, and that is sent over to the railroad every night. That is regular routine, done every day that you ship.

Q. And your railroad notifies you if they consider the rate to be wrong?

A. If the railroad would not protect that rate for you on that routing they would call our boys back.

Q. You do not mean to say that the freight clerk in the railroad office is going to sit down and figure the rate in order to protect you?

A. He knows them. In other words, you are shipping out day after day to the same people, year in and year out.

Q. You have many destinations that you do not ship to every day and year in and year out, two or three hundred, don't you?

A. Well, there are a few that we would have, but the major portion of the business is to the same places day in and day out, the rate clerks in our organization know their routings and their rates in a great many cases without going to the books.

Q. But to all these points that you ship to infrequently, don't you check the Institute rate there to be sure that the railroad is not overcharging you?

28439 A. We use it for billing; we take the Institute freight rate and bill on that basis and file with the railroad.

Q. But your men check it with the tariff so as to be sure the railroad does not overcharge you, don't you?

A. In other words, we have learned by experience in handling the books, that the books reflect the tariff.

Q. Well, answer my question "yes" or "no," do you don't you?

A. Well, pardon me.

Q. Do you or don't you check the rates from their tariff to be sure that the railroad does not overcharge?

A. Well, if you had an isolated case it might arise once in a while every three or four months, maybe; yes, you might go back to your tariff.

Q. Well, you say once in three or four months; those cases arise a good deal oftener than that, don't they?

A. No, I would not say that they do, no.

Q. What qualifications has your tariff man?

A. Oh, nothing any more than he has learned traffic by being in the shipping department all his life.

Q. How many men do you have in your shipping department—I mean dealing with bills-of-lading and invoices?

A. They do not specifically deal—we have in our organization, it is a small organization, and that is one of their functions; they are part of the clerks of the
28440 sales department, and they take care of the bag returns.

Q. Is one of them competent to take rates out of an interstate tariff?

A. Yes, I would say at least two or three of them are. They live with it every day. I do not know as they could develop a complicated rate.

Q. Have you any idea how much time they spend on extracting rates from tariffs?

A. I would say that they do not consult their tariffs maybe more than two or three times a month.

Q. That is largely because your shipments, as you say, go to the same destination point?

A. Repeat, repeat all the time.

Q. Well, you do not have much need for freight rate information, then, do you?

A. Well, any more than others. You have to do one thing or the other. We would have to take this tariff, take the tariffs and make those books of our own. In other words, it would be just handy.

Q. You only have a few points that you ship to,—do you ship to those day after day, so you do not have much need for freight rate books, do you?

A. We do to the extent when we are making those shipments; in other words, the boys can carry the majority of places in their minds, but they cannot carry all in their minds.

28441 Q. You pay about $3,000 a year for that Institute book, don't you?
A. I do not believe we do; no, sir.
Q. You say you ship about 900,000 barrels some years?
A. Yes.
Q. It is three-tenths—it is 3 mills per barrel, isn't it?
A. No; our dues are not that.
Q. What are they?
A. I would not want to answer offhand. I do not know off-hand.
Q. You do not know what you pay for freight rate service?
A. It is a matter of record.
Q. It is so valuable to you you pay out your money without knowing what you pay?
A. No, we pay dues to other organizations, too.
Q. But you do pay about $4,000 a year for the freight rate service?
A. Oh, I doubt that.
Q. That is what my calculation leads me to believe here, figuring on 800,000-barrel shipments.
A. No, I do not know where you got the 3-mill rate.
Q. Well, it is in the record.
A. Is it?
Mr. Werle: It is not in the record that they pay $4,000. You mean it is in the record what the per-barrel
28442 rate is for Institute rate books, and it is also in the record what this company shipped.
Mr. Paulson: That is correct.

By Mr. Paulson:

Q. Now, you could hire a very good traffic man for $3,000 a year, couldn't you?
A. I do not think we pay $3,000 a year.
Q. But you could hire a good traffic man?
A. I never felt the market on a traffic man.
Q. Well, the fact of the matter is those Institute books are available from other angles in other respects than for traffic purposes, aren't they?
A. Well, they are a handy compilation of the tariff.
Q. Well, they make it very convenient for you, and serve your purpose in meeting competitors' prices, don't they?
A. Well, it is a quick compilation of information that you would arrive at by calculation by consulting your tariff and taking your rate and multiplying it.

Trial Examiner Norwood: Oh; answer his question. Read the question again.

(Question read.)

Mr. Leisure: May we have the answer read to that question?

Trial Examiner Norwood: Read the answer.

(Answer read.)

28443 Trial Examiner Norwood: Does it serve the purpose that Counsel meant?

The Witness: No, not the way Counsel mentioned it, no. In other words, our price at destination is the price we meet.

Q. Well, we will pass that for the time being.

Do you have reciprocal arrangements with purchasers?

A. Reciprocal arrangements with purchasers?

Q. Yes.

A. You mean people that we would buy things from?

Q. Yes.

A. Well, anybody we buy from, why, we go in and try to plead for all the business we can get out of them.

Q. You have paid—you made these two statements: One, that you have one price to all purchasers similarly situated, and the other that you are a price follower.

Do those two appear to be consistent to you?

A. Yes, I think they are consistent.

Q. Well, you don't really make prices at all, do you?

A. Well, we make prices in the sense that we are quoting every day in the week.

Q. In other words, your policy is to follow the prices of competitors?

A. We endeavor to meet the lowest price at destination.

28444 Q. You really have no affirmative policy, affirmative one-price policy?

A. Yes, we do have, after all is said and done it is a business firm; we follow—that is part of our reputation.

Q. If your competitors did not have one price for purchasers similarly located you would not have it, would you?

A. Yes, we would.

Q. In other words, you would try to sell your cement at prices different from those of your competitors?

A. Well, I would try to do this,—the very point I make there is I have two dealers in a town, I am not going to give a dealer, one dealer a better price than the other.

Q. Mr. Robeson, what are the highway connections to your plant?

A. I beg pardon?

Q. What are the highway connections to your plant?

A. Do you mean the roads?

Q. Yes.

A. Well, there is a road going by our plant to Easton; then there is a road going out of town to Bethlehem.

Q. Have you a paved road right up to your plant?

A. Yes; not a concrete road but a good road.

Q. How much did the truckers haul per load when you were allowing trucks?

A. I do not recall specifically, but I would say
28445 around forty or fifty barrels.

Q. What was the largest load that you recall?

A. I would say around forty or fifty barrels.

Q. How far was the farthest that it was trucked, that you know?

A. You mean in miles?

Q. Yes.

A. Oh, I do not recall it specifically, but I would say it would be around eastern Pennsylvania.

Q. I do not know how far that is from your mill.

A. Well, giving you a figure, I would say maybe 40 miles, something like that.

Q. Well, did any of them haul a minimum car?

A. No; I do not ever recall any trucks that size.

Q. Were there any truck lines trucking away from your plant?

A. None that I know of, no. Do you mean the time we were trucking?

Q. Yes.

A. No. All the trucking we had coming to our mill were customers' own trucks.

Q. You had nobody who operated a line?

A. Do you mean a commercial trucker?

Q. A commercial trucker.

A. No, not that I recall.

Q. Are you sure that there was not such a trucker?

28446 A. Well, I would say that in my experience I do not recall ever having seen such a trucker around the plant.

Q. Well, did you have anyone trucking away from your plant who established stocks and bid against you?

A. I do not quite follow the question.

Q. Well, I mean, did anyone who bought cement at your mill truck it away and then put the cement in stocks and then when an invitation for bid came out, or somebody wanted some cement, he would sell him from his stock and bid against you?

A. Well, he would not be bidding against us. He would be a customer. That would be the function of a retail dealer.

Q. Did you have anybody in that category?

A. Do you mean dealers taking cement? Yes.

Q. I do not mean dealers exclusively; any private individuals not formerly one of your dealers.

A. Well, I would say all of our sales that were made were made to dealers or contractors who were doing work—actually putting in the work.

Q. Did any of these people who bought cement at the mill and trucked it away later re-sell the cement outside of the dealer trade,—outside of those dealers who trucked?

A. No, I would say the dealer would sell it, that is what he would take it for, and the contractor who put in the work.

Q. What I am trying to find out is whether anybody took occasion to set up stocks and speculate on them, hold
8447 them for future higher prices, or hold them so as to be in position to bid against you on some big letting?

A. No. In the first place, you could not hold cement very long; and, in the second place any bids we would make we would be making in carload lots at some destination.

Q. Did you say that each and every one of your customers who trucked cement from your mill came and told you that they did not want to buy at your mill any more?

A. No, not each and every one. I do not recall each and every one.

Q. Do you suppose that some of them wanted to truck and were dissatisfied?

A. There may be some isolated instances.

Q. Do you know of some?

A. No, I do not, offhand, no, I do not recall any direct protest.

Q. Do you remember anyone coming to your mill after

you had put the policy on, or writing to you and asking that you continue to sell by truck to truckers?

A. No, I do not ever recollect anybody specifically coming to us and wanting to truck.

Q. Would you sell to a man at your mill today if he offered to take a load of 132 barrels?

A. No, sir; we would not.

Q. Why not?

28448 A. Well, for the simple reason that we do not do any trucking. We do not load any trucks. We do not have the facilities for it.

Q. On direct I think you said that one of the reasons for abandoning trucking, or refusing to load trucks, was that you did not have any facilities and the other was greater convenience.

A. We do not have any facilities, and it is a dangerous spot, our mill.

Q. There is some inconvenience in loading railroad cars, isn't there?

A. No, there is not.

Q. Don't they bunch once in a while,—don't orders bunch once in a while?

A. No. I could carry you through that,—I live at the mill all the time. In my office I can look out the window and see the pack house.

Q. I say, don't your orders bunch some days,—you are very busy loading cars, and other days not?

A. Yes, sometimes, but you have this advantage, you can load stock cars, or what the boys at the mill call "no goes" in anticipation of orders.

Q. That is an extra expense to do that, isn't it?

A. No, no. It is all—your packers are paid on piece work, they are paid by contract.

28449 Q. Well, orders for shipment by rail bunch, don't they?

A. Well, you might have more one day than you have in another, but that is what you have your facilities built for, for meeting those peak situations.

Q. You said also that your own loaders are those who load your cars, did not like to load trucks.

A. Packers, we call them.

Q. Packers?

A. No. They are piece workers and they can work much faster in cars than they can with trucks, and they pre-

tested about that, and at the present time we are unionized, we were not that when we were trucking, and if we had to load any trucks today we certainly would pay through the nose for it.

Q. As long as only one truck can be loaded at a time, you would not need very much help to accommodate those who wanted to haul cement by truck, would you?

A. Well, you would need a packer crew to start with.

Q. What does a packer crew consist of to load a truck?

A. Well, a packing crew consists of five men, and you pretty nearly have to have the same five men on a truck that you would have on cars.

Q. Well, when we were out on the West Coast on this case we were told that they had improved methods of loading trucks. Have you studied improved methods for loading trucks?

A. No, we have not; no, sir.

28450 Q. Have you any idea how much more it would cost you to load a truck than it would to load rail?

A. No, I have not any idea at the present time. We would have to make very radical changes in our plant. That would be the thing we would have to study.

Q. If transportation of cement by truck became 20 percent of your shipments, why, the cost per barrel would be very low, wouldn't it?

A. No. I would say that so long as you had to pay your packers so much per hundred barrels to do it, that the unit cost would hold.

Q. Well, you don't know whether they were 15 cents or 3 cents, as an accurate figure on cost per barrel—

A. Not as a specific statement. I could give you items. I know it would cost us more money to load trucks than it would cars.

Q. In other words, you stick to your position that it does cost you more to load trucks than cars?

A. I would say so, yes.

Q. But you don't attempt to say how much more?

A. I have never figured it.

Q. That was not your real reason for discontinuing trucking, was it?

A. Well, that is one of our reasons. In the first place, as I said before, trucking in our case never amounted

28451 to over 2 percent of our tonnage,—2 or 3 percent.

Q. Your real reason was that you were in sympathy with the action taken by competitors, wasn't it?

A. No, not necessarily. We had customers of ours who had protested against our loading trucks, dealer customers.

Q. You are not so—oh, indifferent to the demands of your customers that you wouldn't go to a little trouble to serve them, would you?

A. Oh, and we also are—we listen to their demands, too,—

Q. Yes.

A. —where we can learn something to maintain their good will.

Q. Yes. You have told us time and time again that you are exceedingly anxious to please your customers.

Now, if your customers demand trucking, you say that it is too much trouble to help them. That was not your real reason for discontinuing trucking, was it?

A. That was one of the reasons.

Q. I mean, you draw the line there,—you are not going to accommodate him, if it is trucking he wants; whereas, any other service is all right.

A. Well, the very customers who originally started trucking from our mill were the very people who begin to ask us not to truck from our mill.

Q. Well, but there are still some customers who
28452 wanted to truck?

A. Very, very, very—it would be an isolated case.

Q. Why don't you accommodate those fellows?

A. We don't have the facilities for it.

Q. Why don't your get the facilities?

A. Well, it wouldn't pay us to put in the facilities for those isolated instances.

Q. And it would tend to destroy the present existing price structure, wouldn't it?

A. No, I wouldn't say that it would.

Q. Well, it would have an effect upon it, wouldn't it?

A. It might be a factor in it, but there is another element to it, too. Loading trucks at our mill, we had cement going into our markets, naturally, where we had long-term relationship with dealers at those particular towns, that kept us constantly in hot water with those dealers that had handled our brand; they felt they were entitled to have the call for our brand in that town.

Q. Haven't you expressed yourself on numerous occa-

sions to the effect that you considered trucking a menace to stabilized prices?

A. Who? Me?

Q. Yes.

A. I never have; no, sir.

Q. You never said that in discussion?

28453 A. No.

Q. With any of your competitors?

A. I never said it.

Q. Never written it?

A. I don't recall ever saying it; no, sir.

Q. Has that ever been your position?

A. No, sir.

Q. Did you ever meet with your competitors to discuss the problem of transportation of cement by trucks?

A. No; sir; I never have; no, sir.

Q. Who pays the freight on bags that are returned, Mr. Robeson?

A. On cloth bags?

Q. Yes.

A. We do. We permit our customers to ship them back to us freight collect.

Q. How were bags returned when trucking prevailed?

28454 A. Let us see—1932—either one or the other,—the customer would ship them back by rail, freight collect, as long as we were paying them, or he might bring them back by his trucks.

Q. He would receive no money if he brought them back by his trucks?

A. I don't recall offhand if we made any allowance to him if he brought them back that way,—I wouldn't know to say "yes" or "no" on it.

Q. How much is the freight on 132 bags from New York, say?

A. Well, in the first place, there is definite tariff regulations, and they travel at a class rate, and they must be bundled in bundles of fifty.

Q. Very well.

A. Now, I don't know the rate,—some traffic man might be able to tell you, but I don't know the rate.

Q. You don't know how much?

A. No, I do not.

Q. In approximate figures?

A. No, I wouldn't want to even guess at it.

Q. It is quite high, is it not?

A. No, I wouldn't think so.

Q. How did you establish your price when you were allowing the truckers to come to your mill and get cement?

28455 A. Well, originally, when I came with the Nazareth Cement Company, my recollection is that they were charging them the maximum mill net that we were receiving at that time. Then, in about 1929, I think it was, we added 15 cents a barrel, loading charge, to our maximum mill net, and we discontinued trucking entirely in 1932.

Q. Now, you did say you sold to railroads at the mill, did you not?

A. Well, I said we sold to their lines at our mill.

Q. If you can sell to the railroads at your mill, why can't you sell to anyone who wants to buy at your mill?

A. Well, we sell to the railroads because that is the delivery point, as far as we are concerned. We don't know whether the railroad is going to take it along their lines. If the railroad would give us a specific destination, and ask the price, we would be glad to sell them at that point.

Q. That is not the question. If you can sell the railroads at your mill, why can't you sell anyone else at your mill?

A. We could. There is no regulation to prevent us from doing it.

Q. Why don't you?

A. We don't want to.

Q. Why don't you?

A. We feel our competition is at destination. We want to keep ourselves where we can be competitive at destination.

Q. You would be making your competition if you

28456 sold it at your mill, wouldn't you?

A. Yes, in that sense we would, but—

Q. Don't you want to make your competition there?

A. We prefer to leave ourselves free to go out and meet competition as we find it.

Q. Why don't you want to meet competition there?

A. We built our mill on a basis, and made our investments on a basis that we would go out and compete over the whole Atlantic Seaboard.

Q. What difference to you is it which way you compete,—just so long as you get the business?

A. Well, it is a difference to this extent, that under some of the present-day theories you have of a rigid mill price, we would then get ourselves in a position where we couldn't compete at destination.

Q. Then you do not sell at your mill in order to protect yourself against the inevitable day when you would have to sell at your mill?

A. I doubt whether that day will come, but if it does come we are going to protest against it with all our might.

Q. And you are protesting now, aren't you, by the policies that you adopt?

A. I don't know as you would call it a protest, but on every occasion we have had in the Nazareth Cement Company we have protested against it.

28457 Q. And that is one of the reasons why you adopted the policies that you operate under, is it?

A. That is the reason that we have the policy where we leave ourselves flexible to meet competition where we find it.

Q. You would sooner meet competition at destination points than to make competition by having an f.o.b. mill price?

A. From our standpoint, the Nazareth Cement Company, yes, we want to be free to meet competition at destination.

Q. What advantage is there to you in being able to meet competition at destination, over making the competition at your mill?

A. Well, in the congested area of the Lehigh Valley, as there is no market at our mill, our market is away from our mill.

Q. The only advantage is that the present method has a stability, in that it leaves the destination prices stable, isn't it?

A. No, I wouldn't say that that's the answer to it. We are now in a position where we can meet competition as we find it. If we are to have a rigid or a non-flexible price at our mill, why, then, we would be confined to an area where we couldn't live.

Q. Yes.

In whose name do you urge claims resulting from diversion of shipments in transit?

28458 The Witness: May I have that question again, please?

Trial Examiner Norwood: Read it.

(Last question read.)

A. I don't recall any occasion to make a claim.

By Mr. Paulson:

Q. I thought you said on direct that claims did result from diversion of shipments in transit?

A. No, I never said that, I don't—

Q. Well, do claims ever result from diversion of shipments in transit?

A. I don't recall any claims.

Q. Have you ever had loss in transit on a shipment that was diverted?

A. You mean damage in transit?

Q. Yes.

A. None that ever comes to my mind, no.

Q. On the regular type of shipments, where there is no diversion, do you have loss in transit?

A. Sometimes you do. You might have a car in a collision, or you might have damage by reason of a car having a leaky roof, or something like that.

Q. In whose name are those claims prosecuted?

A. Well, what we do, we have the customer get the proper notations on the freight bill at destination, which is the only thing the railroad will honor, and we tell the customer that if he will submit the proper papers to us we will present the claim to the railroad, and we do; in other words, we automatically credit the customer with the amount involved, and then we file the claim against the railroad.

28459

Q. In his name? The customer's name?

A. I would say we do, yes. I don't know for sure, though.

Q. Do your interests, and the interests of your dealers, coincide?

A. Well, they coincide to this extent, that the retail dealer is the best authority that we have, so that whenever we have any business arise on which we feel that the dealer can perform a function, why, we are glad to sell that cement to the dealer, so that he can sell to the customer.

Our relationship with our customers is one of outright sale.

Q. Well, it is to your interest to sell as much cement direct as possible, isn't it?

A. It may be, and may not be.

Q. That is, it is—

A. You couldn't make a general statement on it.

Q. Well, the Code provision, Article XI, was to the advantage of the manufacturers and to the disadvantage of the dealers, wasn't it?

A. Oh, that was a moot question.

28460 Q. Well, you sold more cement direct, and, therefore, didn't have to make allowances to dealers?

A. No—well, I would like to say there, Mr. Paulson, we made no allowance to dealers. Our relationship with—

Q. You get a higher price on the cement you sell direct, a higher mill net, than when you sell through a dealer, do you not?

A. No, sir; we do not.

Q. You don't get a higher mill net?

A. No, sir; we do not.

Q. As I understand your policy, you give dealers 10 percent discount from your destination prices?

A. No, we don't; no, sir.

Trial Examiner Norwood: Does the customer pay more when he buys through a dealer than when he buys directly from you?

Mr. Paulson: Well, no.

The Witness: No. Our relationship with our dealer is one of direct sale. We sell him. We have no control over what he does with the cement. He makes any price he wants, and we have a minimum price. We will sell to the U. S. Government at that price, and we will sell direct at that price. In instances where our policy says we will sell direct, we will sell direct at that price.

By Mr. Paulson:

28461 Q. On direct examination, Mr. Robeson, you said that you followed the Lehigh marketing plan when Lehigh inaugurated it. That marketing plan was the one I am referring to—was the one where they allowed 5 percent trade discount and held 5 percent back until the end of the year?

A. No, I—in August, 1926, we had the trade discount idea come in which permitted—allowed the dealers a trade discount of 10 cents a barrel, in addition to his cash discount of 10 cents a barrel.

Now, the dealer payment plan was a plan whereby the dealer was allowed 5 cents per barrel payment, but that

was paid to him at the end of the year. The first discount was deductible when he paid his invoice.

Q. That is the policy I am talking about. I say that you adopted it at the time?

A. We did.

Q. When did you abandon it, if you recall?

A. As I recall it, we stayed on it—we adopted it in November, and we abandoned it some time in January. I think we were on it just a couple of months.

Q. What year was that?

A. Well, we adopted it in November, I would say, probably November, 1930, and abandoned it in January, 1931. I have a wretched memory.

Q. What policy did you go on when you abandoned that plan?

28462 A. When we abandoned that plan?

Q. Yes.

A. Well, then, we went on a basis of a flat price to a dealer, allowed him only one discount, a cash discount.

Q. And then the Code was the next change—

A. We stayed, as I recall—

Q. —in your policy?

A. As I recall, there was no change when the Code came along.

Q. No change in that feature of the policy at all? The only change the Code had was in who you would sell?

A. No, that was not even a change. That was merely a confirmation of setting down on paper what our practice was in the field.

Q. Oh, the Code provision took some of the business away from dealers that had formerly gone to dealers, didn't it?

A. I doubt it. I would have to study it again now; it is a long time ago.

Q. What were the dealers complaining about?

A. Well, sometimes I don't think they knew themselves.

Q. Well, they were complaining—and weren't their complaints to the effect—

A. Yes, they did complain—

Q. —that you were putting them out of the market?—

A. They did complain—

28463 Q. —weren't their complaints to the effect that you were putting them out of the trade to which they had been accustomed?

A. Well, there were some dealers, as I recall the situation, whose idea of a dealer's agent is that every bit of cement must be sold through them, and some of them who were hoping that when the Code came along we would be forced to put all the business through them. We didn't feel that they could handle all the business. I am talking of "we," the Nazareth Cement Company. We felt that the dealer has a very definite place in our marketing; he performs a very useful purpose. We feel that there are other instances where he can perform no service.

Q. Then the Code provision was knocked out, in February or January of 1934; is that right?

A. I don't recall the date. I remember the instance but I don't recall the date.

Q. It was in 1934, wasn't it? I just want to get the thing chronologically, here.

A. I don't recall the date, I—

Q. At any rate—

A. But it would be a matter of record.

Q. Yes.

At any rate, when the Code provision was knocked out, some of your competitors began to give in to the dealers and sell them directly, where they had not sold them
28464 directly under the Code; is that correct?

Trial Examiner Norwood: They had always sold them direct, hadn't they?

By Mr. Paulson:

Q. The question is, in instances where under the Code they had refused to sell them, refused to route business through them, that after the Code they did route business through them, you see.

A. Well, let me say this: After the Article XI was suspended there was business which the dealer claimed that he rightly should have, that some competitors would grant him, and we may not be granting him, and then there were other localities where other manufacturers sold direct business that we ourselves felt that that was business that the dealer could rightly service.

Q. You call that period between 1930 and 1935, when you adopted the Lehigh plan, that you found a catch-as-catch-can period?

A. That's correct; yes, sir; that describes it adequately.

Q. Yes. By that you meant that there wasn't any uniform policy in existence by your competitors?

28465 A. No, by locality more than anything else.

Q. Yes.

A. By locality.

Q. But in your locality?

A. No—well, no—if I may explain what I mean by locality.

Q. Yes.

A. I mean by locality within the whole territory we operated. In one part of the country we might be doing that, and because the dealers were more strongly organized and could penalize us more, we would have to concede more in this locality, and then we might be doing half way between those two, in another locality.

Q. So there was an uncertain condition there as to dealer policy between competitors, wasn't there?

A. Where the dealers were strong enough they would usually insist upon all of the business going through them, which we, as the Nazareth Cement Company, didn't feel that they were justified in asking for.

Q. It is very necessary that you offer an advantage to dealers that is equivalent to the advantage offered by your competitors, is it not?

A. Well, the principal thing with dealers is a matter of good will, and it is an intangible thing, you cannot define it, it is cumulative.

28466 Trial Examiner Norwood: Is that right?

The Witness: Well, we must meet the most attractive terms or price that he has, or forego the business.

By Mr. Paulson:

Q. In other words, you could take a dealer away from your competitor if you offered him advantages that your competitor was not offering?

A. Oh, yes, you could take a customer away from anybody, momentarily.

Q. That would not necessarily have to be a price—

A. No.

Q. —a price concession, would it?

A. No, it might be anything. It might be a good sales talk which made him think the thing that we were giving him was more attractive than the other fellow was giving, and it would stand up until our competitor had an opportunity to have learned of the deal, and then we would

28467 say, "They are giving you nothing new, we are giving you the same thing."

It is really field sales work; that's what it is.

Q. But your policy is to adopt the competitors' policy, as I understand it, and not attempt to take dealers away from your competitors?

A. No; in other words, after all is said and done, we have a policy which we have announced, and that is one of the things that we build our reputation on with our customers.

Q. Did you attend any meetings in your territory, in that catch-as-catch-can period, in which dealer problems were discussed?

A. No, sir; I did not.

Q. Did you talk with any one of your competitors about it?

A. Oh, I might talk with any competitors we would meet.

Q. Did you talk with any dealer about it?

A. Dealers? Oh, yes, that's one of my functions, to be in touch with the dealers.

Q. Did you—

A. But not as a group.

Q. Did you talk with the representatives of any dealer association?

A. No, sir; only to this extent, where the officer of the dealers' association might be a customer of ours. I will talk with him then, but I won't talk with him as a paid hireling of the association.

28468 When I say "I won't talk with him," I would naturally be courteous, and let him come into my office; I won't put him out, I will listen to him as to what he has to say, but—

Q. How long after you received notice that Lehigh had published an announced policy in 1935, after this catch-as-catch-can period, did you adopt that policy?

A. Immediately, just as quick as we could get the notices out.

Q. Didn't you study them?

A. Yes, I did study them.

Q. I think the record shows that you adopted it the same day?

A. That is correct.

Q. Did you hold any board meeting about it?

A. No, I didn't have to; that's one of my functions, sir.

Mr. Paulson: I believe that is all, Your Honor.

Trial Examiner Norwood: Redirect.

Redirect Examination by Mr. Leisure.

Q. After Lehigh adopted its April, 1935, policy, how soon after that did you adopt your policy, Mr. Robeson?

A. Oh, my recollection—Lehigh's policy, I think, we adopted that within one or two days after Lehigh.

Mr. Leisure: That is all.

28470 GEORGE H. ELLIOTT, called as a witness for the Respondents, being first duly sworn, testified:

Direct Examination by Mr. Leisure.

I am vice-president of Whitehall. I have no other official position than that but in a way I am also the general manager of the company. I have been serving in my present capacity for about fifteen years. Before that I was manager of sales. My prior experience in the cement business was that from 1901 to 1912 I was with Lesley & Trinkel Company of Philadelphia who were sales agent for several companies; from 1912 until 1916 I was
28471 with Alpha; from 1916 until 1918 I was with Edison.

Neither I nor any of the other officers I have named are officers of any other cement company. Whitehall is not affiliated in any way with any other cement manufacturing company.

28474 Whitehall has one mill located at Cementon, Pa. about seven miles north of Allentown and less than a mile from Northampton. The present plant was really built in 1900 but there have been changes and alterations since that time. Whitehall has a quarry adjoining the mill and has made a survey of its rock supply. On the present floor level Whitehall, manufacturing at pretty full capacity, has about forty to forty-five years' supply. Whitehall had four or five test borings made in 1925, I think, which showed it had fifty to fifty-five years on the present level.

28476 Q. There has been testimony here with regard to the change in requirements; namely, for dark cement on certain road jobs. What is your experience on that? Do you have any demand for so-called dark Portland cement?

A. We do, and we manufacture it.
Q. How long have you been making it?
A. I would say four years.
Q. Before you started to manufacture it, did you have any demand for it?
A. Yes, sir.
Q. How did your meet that demand?
A. We bought it, I think, for about a year.
Q. Does it cost at your mill any more for you to manufacture it than standard Portland cement?
A. Yes, sir; it does.
Q. In selling it, do you get any more for it than you do for the standard Portland cement?
A. No, sir.
Q. If it costs you more why don't you sell it for more?
A. Well, we could not get it. We have to meet the competition and nobody gets any more than I know—I have never seen a price higher than that, on dark cement.
Q. Competition from where? Where is that?
A. From my competitors.
28480 Q. How many kilns do you operate?
A. Six.
Q. You mentioned changes that had been made with the present unit that you are operating. Are you
28481 able to turn out more or less than previously?
A. We would be able to turn out more under the same conditions. In other words, if we were manufacturing the same kind of cement, for instance, that we did in 1918, we could turn out more, although, of course, that is theoretical because you might have a breakdown, but running under proper conditions we could turn out more.
Q. At what percent of capacity did your mill run last year, 1938, Mr. Elliott, if you know, as you figure your capacity?
A. I would say in the neighborhood of 75 or 80 percent.
Q. How does that compare with your rate of operations during former years?
A. Well, 1932 and 1933, in through there, I think we got down to around 33, 35 percent.
Q. What about the years 1927 and 1928?
A. Oh, I would say it was up, 75 or 80 percent.
Q. Your company is a member of The Cement Institute?

A. Yes, sir.

Q. Prior to joining the Institute did you subscribe or receive any of the Mallory statistics which have been mentioned here?

A. No, sir.

Q. You did not?

A. No, sir.

28482 Q. When I was talking to you about capacity a moment ago, I neglected to ask you what your storage capacity is.

A. For finished cement?

Q. Yes.

A. About 425,000 barrels.

Q. Have you increased that since you came with the company?

A. No. We have changed it but I would not say we have increased it. Owing to the change in the specifications requiring smaller units of testing, we did put in some silos in about 1922, I think it was, or '23, but I do not think we have increased our actual capacity very much, possibly fifty or sixty thousand barrels.

Q. You mean the silos were put in to take the place of the bins?

A. Yes, the bins were large, they held more cement, but you could not break it up into smaller quantities, so we removed some of the bins and replaced some of them with silos which gave us better flexibility. That is the reason it was done.

Q. Is your storage capacity a factor, any factor, in deciding at what percentage of capacity you will operate?

A. Yes, it would be.

Q. Do you have any regular practice with regard to shut-downs?

A. Well, we usually shut down around the end of the year to re-line kilns, and so forth, but we do not have any general practice. We run as much as we can.

28483 Q. I mean by that, do you have any set days of the week, or any special number of kilns that you will operate?

A. No, sir. That is determined on the amount of business we have and the conditions.

Q. Do you make any use of clinker statistics?

A. No.

Q. I do not remember whether I asked you whether you receive the Bureau of Mines' statistics, or not.

A. Yes, sir; we do.
Q. Do you receive it?
A. Yes, sir.
Q. Do you use them, and, if so, will you tell us how?
A. Not for any particular reason; a matter of information, but they really do not mean anything to us.
Q. Do they indicate to you how other mills are producing, and how business is,—is it any kind of a gauge?
A. Oh, yes, it is more or less of a gauge for that, to know whether they are busy, and whether they are not.
Q. As to that, Mr. Elliott, do you regard the production of other mills as any indication of what business there is available?
A. No, sir.
Q. Well, if other mills are busy, is that any indication to you as to whether or not business is good or bad?
28484 A. Well, of course, if the other mills are running pretty nearly full, it is a safe assumption that business is very much better.
Q. And if business is better, do you ordinarily expect or try to get some portion of it?
A. We try to get all we can.
Q. Mr. Elliott, do you use the reports of Dodge and Dun's?
A. Yes, sir; we do.
Q. Do you use any shipment figures in your sales department?
A. Oh, yes, we have shipment figures.
28485 Q. You told us about your using—or, rather, receiving the Bureau of Mines' figures.
Do you make any different use of them today than you did when you first came with the Whitehall Company?
A. No, sir.
Q. Do you use the Institute figures, Mr. Elliott?
A. Not any differently than we would the Bureau of Mines.
Q. Who in your company determines the rate of operation of your company?
A. I do—granting there is no labor trouble, or something that the mill would have to stop. I would set the policy.
Q. Have you ever concerned yourself with how the balance of shipments in your district are divided amongst other companies?

A. No, sir; I never have.

Q. Do you ever use statistics for districts outside of districts 1 and 2?

A. Possibly a little in Virginia; we ship some little into the State of Virginia.

Q. Referring to Commission's Exhibit 230, is there any difference in the form or the manner in which you report to The Cement Institute, and the manner in which you report to the Bureau of Mines?

A. No, sir; there is not.

Q. Has there ever been since you have been with your company?

A. No, sir.

28486 Q. In the manufacture of cement, is your company a small company or a large company?

A. Small.

Q. Into what territory do you normally ship and sell cement, Mr. Elliott?

A. New England, part of New York State, New Jersey, eastern Pennsylvania, Delaware, Maryland, part of Virginia, some—

Q. Do you get into Washington, the District of Columbia?

A. Yes, sir.

Q. What about North and South Carolina?

A. No.

Q. Do you have any sales force which solicits business, and, if they do, do they solicit in your territory?

A. Yes, sir; we have, and they do.

Q. You have told us of normal territory; are there any territories into, which you have shipped and no longer ship?

A. Oh, yes, we used to ship out,—we had business in Ohio, some in West Virginia, and further down in Virginia, and in northern New York, up as far as Buffalo.

Q. What were the reasons which led you to abandon them?

A. Well, new mills there with a shorter freight rate, we were not in a position to compete; that is, we could compete, but the difference in the freight rate made it undesirable.

Q. I want to call your attention to another Commission's exhibit, 1063-A to D, which purports to be a

28487 Government letting, at Rolling Fork, Miss., and I

ask you whether you bid on that letting (showing document to witness)?

28495 Q. Bringing it down to your daily experience today, would you say that you follow the same or any different method in figuring your prices today from the method you used back as far, say, as 1912?

A. Well, now, we figure destination price. Back in 1912 we figured a destination price, but from about 1914, 1915 up until about 1922 with the Whitehall Company, they figured a mill price.

Q. And when you did figure the destination price, as you described, back in 1912, did you use the same
28496 or different method than the one you use today?

A. The same method.

Q. And did you at that time sell at delivered prices?

A. Yes, sir.

Q. With respect to your mill, Mr. Elliott, how did you determine price that you will quote at any particular destination?

A. Well, we have the freight rates; we have our own traffic department; we have the books, we took the mill plus the sacks plus the freight to destination.

Q. You told us—I asked you first how you determined your price, and you told us. Now, I am asking you with respect to that answer whether or not that is the way you make your price in the first instance, or whether
28497 or not that is the way you can determine what base or what figuring point a price is figured from?

A. Well, we could do it both ways. We can figure back and find out the base that will govern it, or we can take our base and figure it up and compare it to the prices which we know are in the field.

By Mr. Leisure:

Q. And as to that, Mr. Elliott, is there any difference with respect to that and the way you operated as far back as 1912?

A. No, sir; no difference.

Q. Now, in figuring your prices as you have described to us and the method which you use, has that procedure, in your experience, been the result of any conference
28498 or agreements or understandings between your company and your competitors?

A. Absolutely not.

Q. Now, you have told us you have charge of the policies of your company. How do you decide, Mr. Elliott, whether you will meet a price change or withdraw from the market?

A. Well, that would depend on a number of conditions. It would depend upon the business that we had at the time the question came up, the specification, the time of delivery, whether it was in a permanent market, and especially the specifications at the present time would have quite a bearing on it.

Q. Would the return which you are getting on your business have any bearing on it?

A. Oh, well, naturally that would influence it.

Q. And would the condition of your order book have any bearing on it?

A. Yes, quite a little.

28512 Q. You told me on direct examination, Mr. Elliott—and correct me if I am wrong—that you picked up quotations in the field and you got them in two ways, one from the dealers and the other from your salesmen picking them up?

A. Yes, sir.

Q. Now, in response to Mr. MacIntyre's voir dire examination you mentioned a third possible way in which you could get a quotation. He asked you if it could have come in an envelope from the company and you said it could, but you did not think it was done; is that correct?

A. That is correct.

Q. Then he showed you one from the Keystone having to do with high early strength cement?

A. Yes, sir.

Q. And you said as to that it was probable or they might have, I think was your language, might have sent it to you?

A. Yes, sir.

Q. Now, let me call your attention to something on this exhibit and ask you whether or not, having had that

28513 called to your attention, you cannot now state positively that it was not sent to you by the Keystone Company; namely, will you look at the dealer—would there have been a dealer's name on it if the Keystone Company sent it to you?

A. No, sir. This came from the Portland Stoneware Company.

Q. And that was August 15, 1934?

Mr. Seeley: What is the date of that stamp?

The Witness: August 23, 1934.

Mr. Seeley: And what is the date of the quotation?

The Witness: August 15.

Mr. Seeley: 19 what?

The Witness: 1934.

Trial Examiner Norwood: Did the addressee send it to you?

The Witness: That I don't know. Our salesman might have brought it.

Trial Examiner Norwood: You know that you received it, at your office, do you?

The Witness: Yes, sir; I do. It has our stamp on it.

28515 (RESP. EX. 1623-A, 1623-B, 1623-C, and 1623-D, was offered and received in evidence.)

By Mr. Leisure:

Q. And this is typical of quotations that are picked up and sent in by your various salesmen and dealers to you?

A. Yes, sir.

Q. Now, after your sales department has calculated from this information which you have told us about, which was received in the manner which you described, after the information is picked up in the field do you compile any list of prices based on these figures?

A. Yes. We have a card index system.

Q. Do you furnish your salesmen with any such list of base prices?

A. Sometimes; not very often.

Q. What use, Mr. Elliott, do your salesmen make of those lists, if you know?

A. Well, they are used in the office to check, so it
28516 is quicker, prevents going back and losing time, especially with the telephone.

Q. Does the Whitehall Company have a base price at its plant?

A. No, sir.

Q. As to these lists of base prices, in any particular territory is it always governed by the same base mill?

A. No. I would not say in any particular territory; it varies.

Q. Well, let me ask you this: Does the so-called Lehigh Valley base govern prices in any defined area?

A. Well, in Pennsylvania, in eastern Pennsylvania, down through there, it would.

Q. And beyond that has it any defined area?

A. Well, it would fluctuate; I could not give you the boundaries.

Q. As far as your mill is concerned, did you ever have any meeting with competitors, or any understanding or any agreement of any kind that you would or would not establish or maintain any basing point, or fail to establish any basing point?

A. No, sir; we never did.

28517 Q. Understanding or agreement with your competitors, of course I meant.

A. Yes, sir. You said that before.

Q. Is there anything to prevent your establishing a price base at your plant if you feel at any time it is to the best interest of your company to do so?

A. No, sir; we could do it.

Q. Well, then, why don't you establish a base at your mill?

A. Well, we are right in the center, we are only about a half a mile from a Northampton base, right across the river from a mill. There are two or three mills around us, and there is no business right at our plant.

Q. When this company, the Whitehall Company, started to operate was the destination pricing method and the use of basing points in effect when it started to operate?

A. Yes, sir; I think it was, although I was not connected with them then.

Q. What is the shipping point for your mill?

A. Cementon, Pa.

Q. And your mill is about how far from the nearest basing point in the Lehigh Valley?

A. I would say less than three-quarters of a mile.

Q. And are there any towns in between Cementon and this base that you are speaking of?

A. No, Siegfried is right across the river, the

28518 other end of the bridge from Cementon, and Northampton adjoins that.

Q. Is there any market in between the two places?

A. No, not of any consequence.

Q. In the event of a change in price, or market move of any kind, what, if anything, do you do to check the prices in your mill town?

A. You mean at the time?

Q. Yes. I was thinking of the points in between that you just told us about, where you said there was no market of any consequence. I wanted to know whether you checked them in the same way that you check other points.

A. Yes, but we only sell about possibly one car a year, in the vicinity of our plant.

Q. Yes, and my question is whether or not you
28519 checked that up—

A. Yes.

Q. —in the way that you check other points, when there is a price move.

A. We do.

Q. Has The Cement Institute ever had anything to do with how you determine your price in the town where your mill is located?

A. No, sir.

Q. As to these lists of basing points you have told us about, have you ever received any lists of basing points from your competitors?

A. No, sir.

Q. Or from The Cement Institute?

A. No, sir. Possibly during the Code time there were some prices sent out—filed prices.

Q. Has The Cement Institute ever had anything to do with how you determine prices, anywhere?

A. No, sir.

Q. And these lists of basing points, have you ever given any of those lists to any of your competitors?

A. No, sir.

Q. I was just asking you about your method in checking in the event of a price move.

Do you recall any change— Well, let me be spe-
28520 cific: Do you recall any price change in July, 1938— any price changes?

A. No, sir; I don't, offhand.

Q. What railroads serve your plant, Mr. Elliott?

A. We originate on the Lehigh Valley.

Q. Do you sell any of your products to railroads?

A. Yes, sir.

Q. How do you quote them?

A. Usually f.o.b. their lines.

Q. Would you say that is any exception to your customary practice?

A. No, that's been done for a number of years.

Q. Taking up the freight rate books, does your company subscribe to the use of them? I mean the Cement Institute freight rate books?

A. Yes.

Q. How long has your company been a member of The Cement Institute?

A. Since May, just before the Code was started, or June —I don't—it was May or June, I can't recall.

The witness identified Resp. Ex. 1628 as a copy
28521 of a letter dated May 23, 1933 that he wrote to The Cement Institute with regard to the subject matter just discussed; Resp. Ex. 1629 as a letter which he received from The Cement Institute dated June 19, 1933 answering his letter (Resp. Ex. 1628).

28525 (RESP. EXS. 1628 and 1629 were offered and received in evidence.)

By Mr. Leisure:

Q. Mr. Elliott, how did you happen to join The Cement Institute at that time?

A. Well, the Code was coming into effect and we understood that unless you were a member of some association you would have no standing under the Code, you had to go through some association, so that you could speak for an industry, and for that reason, we joined.

28526 Q. Now, you have told us something about your —experience back in 1912. Did you or did you not attempt to meet competitive prices back as far as—as long as you have been in the cement business?

A. Yes, sir.

Q. Were you able to meet competitive prices prior to the time that you subscribed to the Institute and got the Institute freight rate books?

A. Yes, sir.

Q. Any differences as to that at all, as to your ability to meet competitive prices even before you got the freight rate books or after you got them?

A. No, sir.

Q. I am talking about the freight rate books of The Cement Institute, of course.

A. Yes, sir.

Q. Well, if that is so, Mr. Elliott, what is the reason—what is the purpose for you using The Cement Institute freight rate books in your company?

A. Well, it is much less cumbersome, it is quicker, it gives us a check against the tariff, it prevents errors.

28527 Mr. Leisure: I meant to ask you a moment ago whether or not the freight rates from your mill are the same or different from the rates from Northampton.

The Witness: They are the same.

By Mr. Leisure:

Q. Wouldn't they be the same to nearby destinations?

A. No, they might be different on the other side of the river to very close destinations.

Q. Now, coming back to the freight rate books, do your salesmen carry freight rate books which are furnished by The Cement Institute?

A. Some do and some do not.

Q. As to those who do, for what purpose are they carried?

A. Well, sometimes with a man who is covering a territory that he is not entirely familiar with, it helps him quickly.

Q. Would he make any other use of the freight rate book, to your knowledge?

A. No, sir.

Q. Do your salesmen carry lists of destination prices, or, let me put it this way: Was there ever any time when your salesmen did carry lists of destination prices?

A. No, sir.

Q. Now, prior to your previous experience, have

28528 you, prior to the time you used The Cement Institute books have you used other freight rate services of different kinds?

A. I think running back to 1922, in through there, we bought some from the Nazareth Bureau.

Q. Well, now, as to those, the use of those books furnished by outside bureaus, do you know whether your traffic man compares them with the tariff?

A. Oh, yes, he does.

Q. Is there any difference in the manner and method in which you use the Cement Institute books and the use you made of those other books?

A. No, sir; not any.

Q. Do you receive that service?

A. No, sir.

Q. Has your company, Mr. Elliott, ever had any agree-

ments or understandings of any kind that you would or would not, or as to how you would use freight rate books?

A. No, sir; we never had any agreement.

Q. In quoting your own destination prices, do you take into account freight rates from other mills?

A. Oh, yes.

Q. In competing with these other mills do you absorb any freight?

A. On occasions we do, yes.

Q. Could you tell what freight you had to absorb, if you did not have some kind of freight informa-

28529 tion?

A. No, I would have to have some freight information.

Q. Has your company ever quoted the Federal Government at any point where land-grant freight rates were involved?

A. No, sir.

Q. Or solicited business in any territory where the land-grant freight rates were involved?

A. No, sir.

Q. Well, without calling your attention to any exhibit, just let me ask you the simple question: Has the Whitehall Cement Company ever selected any route so as to deprive the Government of any land-grant freight rates, to your knowledge?

A. No, sir; they have never done it.

Q. Taking up the subject of imported cement, Mr. Elliott: What is your policy? Have you met special or depressed prices in areas affected by imported cement?

A. We have.

Q. What is your practice? Do you or do you not attempt to curtail your sales in such areas?

A. Well, we take care of our trade but we possibly would not solicit the business as strenuously on account of the depressed prices. That again would depend upon the business we had on our books, and how badly we needed orders. We still feel we would have to take care of our trade.

Q. How much of your product do you market in areas affected by competition of imported cement?

28530 Mr. MacIntyre: Just a moment, Your Honor please. Unless the witness can speak of his own

knowledge as to factual data, we will have to object to that.

Mr. Leisure: That is what I am asking.

Mr. MacIntyre: It is almost obvious he would have to answer in speculative fashion. He does not know what territory is affected.

By Mr. Leisure:

Q. To the best of your knowledge, what percentage of your shipments are made in these depressed areas, Mr. Elliott?

Trial Examiner Norwood: Well, do you know what those depressed areas are?

The Witness: I am taking for granted you mean New York, Boston, Baltimore, possibly Richmond.

By Mr. Leisure:

Q. I mean whatever the depressed areas are that you find in your business.

Trial Examiner Norwood: Yes.

A. I would say it would affect about 70 to 75 percent of our business.

Q. And how long—

Trial Examiner Norwood: Affect 75 percent of your total business?

The Witness: Yes, I think so.

28531 Trial Examiner Norwood: I see.

By Mr. Leisure:

Q. How long have you met competition of that kind?

A. Well, imported cement has been a problem, I would say, for, oh, possibly ten or twelve years.

Q. Was there any period—did there come a time that it was more serious to you than others, or has it been about normal all along?

A. Well, I think it was worse around 1933, 1934; in through there.

Q. What has been the position of your company, Mr. Elliott, as to initiating any of these depressed prices in these so-called arbitrary areas?

A. We have never initiated any depressed prices.

Q. Did you meet them? Did you meet the depressed prices?

A. Sometimes we did and sometimes we lost the business.

Q. How did you discover what these prices were?

A. Well, the dealers would call up and say that they had lost the job to imported cement. Our salesmen would send in reports and say they could not sell jobs on account of imported cement.

28532 Q. Did your company ever have any special policy with respect to dealers who handled foreign cement?

A. No, sir; we never did.

Q. Did you ever instruct your salesmen to refuse to sell to dealers who handled foreign cement?

A. No, sir.

Q. Referring to Commission's Exhibit 1160-A, and also 1160-A to blank, indicates statements made by certain dealers to the effect that all domestic cement manufacturers had refused to sell to Jenney & Lux and had salesmen watching their plans.

Did you company ever refuse to sell to Jenney & Lux?

A. No, sir.

Q. Did you ever have any salesman watching their plant?

A. No, sir.

Q. There is also referred to, in the same exhibits, a so-called blacklist. Did you ever know of any so-called blacklist?

A. No, sir.

Q. Did you ever hear of any blacklist at that time at all?

A. No, sir.

28533 Q. Did any of your salesmen ever have any such instructions to watch Jenney & Lux?

28534 A. No, sir; they never did.

Q. Do you have any policy with regard to having your salesmen report fully as to foreign and domestic cements that dealers are handling?

A. They are supposed to report anything at all which is different, or which might be of interest.

Trial Examiner Norwood: That is, with regard to sales.

The Witness: Yes.

Trial Examiner Norwood: Particularly with regard to sales?

The Witness: Our interest in anything that might affect the company.

By Mr. Leisure:

Q. Does that apply to imported as well as domestic cement?

A. Yes, sir.

Q. How long has that been your practice?

A. Well, practically ever since imported cement became a factor in the market.

Q. Have you always sold to some dealers who, at the time, were handling foreign cement?

A. We never made any exception but we have sold dealers who have handled foreign cement, yes.

Q. And do you do so today?

28535 A. I can't answer that because there is a very little imported cement in the market at the present time.

Q. Has your company ever taken any action, or have you ever intended to take any action that could be described as boycotting dealers who handle foreign cement?

A. No, sir; we never have.

Q. A moment ago I showed you a price filing from The Cement Institute, represented by Commission's Exhibit 308-B. You said you had no personal knowledge of having received it. If your name appears on the list there indicating that your company received it, would that refresh your recollection any as to whether or not your company did receive that?

A. No, sir; I don't remember seeing it.

Q. Let me show you two other price filings here which also carry the name of your company, and which are also from The Cement Institute. They are Commission's Exhibits 210-C to blank, and Commission's Exhibit 985-A to blank. Did you receive those price filings?

A. Not to my personal knowledge, no, I do not know.

Q. Who in your office would receive something of that kind when the name of your company appears as being one of the ones that did receive it?

A. Mr. Stanger might, and it might come up to me. I do not say that we did not receive them. I say that I do not remember seeing them.

Mr. MacIntyre: In the interest of saving time, if 28536 Mr. Leisure would like to prove the Whitehall did, or have the record show that Whitehall did receive these three, we will stipulate that he did and the record may so show.

By Mr. Leisure:

Q. Well, you do not have any doubt about having received it, since your name appears there on the list, do you, Mr. Elliott?

A. No, sir.

Q. You just do not recall it personally?

A. I just do not recall.

Q. Those last notices of filing which I have just called to your attention, Mr. Elliott, which appear to have been sent to your company, as well as to other companies indicated, they indicate the filing of prices for stock of cement in Brooklyn in July of 1935. Did you ever have any stocks of cement in Brooklyn?

A. No, sir.

Q. Did you ever make any filing with the Trade Practice Committee of any prices on cement for Brooklyn?

A. No, sir.

Q. Did you have any dealers in Brooklyn during this particular time?

A. No, sir.

Q. I am now referring to the time described by the Exhibit 210, price filings indicated there. Did you
28537 have any dealer in Brooklyn during that period of time?

A. No, sir.

Q. Before leaving the subject of imported cement, does your company attempt to meet the price of foreign cement?

A. No, we have never attempted to really meet it, except in a few instances during depressed times, we had a depressed price, but I don't think they ever really met the imported price. I think the imported possibly could have been lower and possibly was lower, but there was a feeling, with a great many people, that they didn't want to buy imported cement if they could get a fair price as compared with imported cement, and buy American.

Q. According to that first Commission's Exhibit 1043-2-E, the statement of the writer of that letter,
28538 the Reading Railroad, was going to confer with your company regarding trucking.

Did the Reading Railroad, or any of its representatives, ever confer with anybody in your company regarding trucking, to your knowledge?

A. No, sir; not to my knowledge.

Q. Well, did you ever confer with any railroad official in regard to cement trucking?

A. No, sir; I did not.

Q. To your knowledge, did any representative of a dealer association ever confer with you on this matter?

A. No, sir; they never did.

28539 The Witness identified Resp. Ex. 1630 as a copy of a letter signed by P. D. Gaskill, vice president of Whitehall, dated March 12, 1932, addressed to Mr. Ishmael Burton, Chief Examiner of the Federal Trade Commission, Washington, D. C.; Resp. Ex. 1631 as a letter from the Federal Trade Commission, Washington, dated March 4, 1932, addressed to Whitehall.

28540 (RESP. EXS. 1630 and 1631 were offered and received in evidence.)

By Mr. Leisure:

Q. Now, referring to Respondents' Exhibit 1630, a copy of which I hold in my hand, what portion or what proportion of your shipments, of your total shipments, did those 500 barrels per year amount to, Mr. Elliott, approximately, if you know?

A. I do not think I could figure that very closely. It would be about—

Q. Just approximately.

A. One-twentieth of one percent, I guess. I don't know.

Trial Examiner Norwood: Did it exceed 500 barrels?

The Witness: It did not exceed 500 barrels.

By Mr. Leisure:

Q. What did those orders amount to, in size—I mean, were they less than carload lots or more than carload lots?

A. Yes, they were less than carload lots.

28541 Trial Examiner Norwood: And you had no fixed policy with regard to trucking?

The Witness: No, sir.

Trial Examiner Norwood: That is at the time you wrote that letter?

The Witness: Yes, sir.

By Mr. Leisure:

Q. Do you do trucking now, Mr. Elliott?

A. Yes, sir.

Q. When did you discontinue it?

A. We never did trucking.
Q. You never did trucking?
A. No, sir.

By Mr. Leisure:

28542 Q. Suppose the record—so that the record will be clear, suppose you tell us what you mean by that, Mr. Elliott?

A. We never sold any cement to trucks at the mill at any time with the exception of what we would term small lots, and I can't give you the exact figures, but we just put in that figure, 500 barrels, just local business. We never did any trucking of any amount, if I may put it that way.

28543 Q. Now, Mr. Elliott, when I asked you whether you had had any requests for trucking, and you said you were not equipped for trucking,—just what did you mean by that?

A. Well, in our plant it would have required loading platforms; it would have required a change in the way we packed our cement, and it would have slowed up our operations very considerably, so that the amount we might have gotten from trucking would have been offset by the loss caused by the trucking.

Q. Now, there has been certain evidence offered here in which your company is not excluded from the group in any way, and there are charges in the complaint that your company has collusively resorted to various means for preventing the use of trucks by companies for the delivery of cement.

28544 What have you to say as to that, those charges, and that proof in the record?

A. We have never done that.

Q. You mentioned that it would be necessary to build certain platforms. What about your roadways; are you equipped, as far as that is concerned, for truck delivery?

A. You mean, do we have a hard road in the plant?

Q. Well, do you have roadways leading from your plants that would accommodate trucks, yes.

A. Yes, sir.

Q. In your own decision not to load trucks, has your company been influenced by the contact with any dealers' associations?

A. No, sir.

Q. Or with the railroads?

A. No, sir.

Q. And you have already told us that it was not due to any contact with your competitors?

A. No, sir; it was not.

Q. Do you make any shipments by water?

A. No, sir.

Q. Do you have any opportunity for delivery by water from your plant?

A. No, sir.

Q. In your experience, since 1924, as you have described, do you know of anything cheaper than rail
28545 transportation by which you can distribute your cement?

A. No, sir.

Q. And on this general subject of trucking, and as to your own activity in it, did The Cement Institute have anything to do with your own policy or decision as to whether you would or would not truck?

A. No, sir; they did not.

28546

New York, N. Y.,
December 12, 1939.

28547 GEORGE H. ELLIOTT thereupon resumed the stand and testified further as follows:

Direct Examination (Continued).

28548 (RESP. EXS. 1492, 1493-A, 1493-B, 1494-A, 1494-B, 1495-A, 1495-B, 1496-A, 1496-B, 1497-A, 1497-B, 1498-A, 1498-B, 1499-A, 1499-B, 1500-A, 1500-B, 1501-A, 1501-B, 1502, 1503, 1504-A, 1504-B, 1505-A, 1505-B, 1506-A, 1506-B, 1507-A, 1507-B, 1508-A, 1508-B, 1509-A, 1509-B, 1510-A, 1510-B, 1511-A, 1511-B, 1512-A, 1512-B, 1513-A, 1513-B, 1514-A, 1514-B, 1515-A, 1515-B, 1516-A, 1516-B, 1517-A, 1517-B, 1518-A, 1518-B, 1519-A, 1519-B, 1520-A, 1520-B, 1521-A, 1521-B, 1522-A, 1522-B, 1523-A, 1523-B, 1524-A, 1524-B, 1525-A, 1525-B, 1526-A, 1526-B, 1527-A, 1527-B, 1528-A, 1528-B, 1529-A, 1529-B, 1530-A, 1530-B, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538-A, 1538-B, 1539-A, 1539-B, 1540-A, 1540-B, 1541-A, 1541-B, 1542-A, 1542-B, 1543-A, 1543-B, 1544-A, 1544-B, 1545-A, 1545-B, 1546-A, 1546-B, 1547, 1548, 1549, 1550, 1551, 1552, 1553, and 1554, were offered and received in evidence.)

28550 By Mr. Leisure:

28551 Q. I do not remember whether I had gotten far enough to ask you any questions about water shipments, or not. Does your company make any water shipments?

A. You did ask me if we could ship by water, and I said no.

Q. In your long experience in this business, Mr. Elliott, do you know of any cheaper-than-rail transportation by which you can distribute your product?

A. No, sir.

Q. And has your company—I mean the Whitehall Company—ever deprived the Government of any special rate in any of its territory where you do business?

Mr. MacIntyre: Just a moment.

28552 I object, Your Honor, please. The witness has testified he does not use land-grant rates; unless some question is laid for the foundation I think it is improper.

A. No, we never did.

28553 Have you ever had or do you have any concept of what you consider to be a dealer?

A. Well, we consider a dealer a man who is in business and handles a line of building material and services the trade at a given point.

Q. How long have you had that concept of a dealer, to your knowledge?

A. Oh, practically my whole business career.

Q. That covers prior to your coming to this company, does it?

A. Yes, sir.

Q. And as to that, Mr. Elliott, have you ever issued or followed any printed statement of a definition of what you consider to be a dealer?

A. No, sir; except during the Code, there was an article in there, but I think that was afterwards cut out, but we never had any special idea of a dealer. We more or less took it up on its own case as it came up.

Q. Well, now, you were in the same line of business both prior to and after the Code when that provision was used by the Code. Did that change your definition of a dealer in any way; if so, will you tell us how?

A. No, we did not change any of our dealers on
28554 account of that, no, nor did we change any of our ideas.

Q. Well, you say it did not change any of your ideas. I just want to be sure the record is clear.

Did your policy, as far as who or what you would constitute a dealer change any either before or after the Code, or during the Code?

A. No, sir; it did not. It did not change at all.

Q. Mr. Elliott, do your salesmen have any instructions as to whom they will sell, or whom they will not sell as a dealer?

A. No, sir.

Q. In their training do you make any effort or do they know what your concept is of a dealer?

A. Oh, yes, they would, and they would know in going into a town whether a man was equipped to handle building material and act as a dealer; service the section in which he was selling.

Q. Now, you say in going to a town,—what is the procedure—

28555 Q. Regardless of the definition, then, Mr. Elliott, of what your concept is of a dealer, in your regular method of doing business, what is your procedure in selling your product when you come into a situation in which you solicit new accounts?

A. Well, salesmen go to all the people in that town selling cement, and if he should get an order, then it would be up to us to decide whether the credit, and everything else, was all right, if we sold them.

Trial Examiner Norwood: And you check him as to whether he is a dealer, or as to whether he should be shipped on terms, or not; is that right?

The Witness: Yes, sir.

By Mr. Leisure:

Q. Well, in your checking him, as the Examiner has just mentioned, do you have any set policy as to what is or is not a dealer, or—

A. No, sir; we would not know in a strange town, especially.

Q. In coming to these determinations, Mr. Elliott, do you consult anyone outside of your own company,—your competitors or dealers' organizations, or anyone else?

A. No, sir.

28556 Q. What has been your practice? Have you made it a practice, or have there been any times when

you have discontinued selling to—well, one man as a dealer, because you found some of your competitors were not selling, or vice versa?

28557 A. No. We might change our dealers in a town for reasons, but not because—

Did you ever cease to sell any dealer because of the opposition of any dealer organization?

A. No, we did not.

Q. In selling to your dealers, regularly, is there 28558 any requirement within your own company that a dealer must belong to any dealer organizations? Does that enter into your consideration?

A. No, sir.

Q. Has The Cement Institute ever influenced you, or had anything to do with your policy in regard to what you consider a dealer's qualifications?

A. No, sir.

Q. Do you know of any so-called list of approved or unapproved dealers, known as a blacklist? Have you ever heard of any such list as that kind?

A. No, sir; I have not.

Q. During the period of time that you have sold cement, how long have you used dealers for the distribution of Whitehall cement?

A. Of Whitehall?

Q. Yes.

A. Why, during my whole period.

Q. What is the principal outlet of the cement of your present company?

A. Through dealers.

28570 Mr. Paulson: I think that is correct, Your Honor, and I think that Mr. Wooden stood up at the hearings at Washington and admitted that dealer business is the backbone—

28571 Trial Examiner Norwood: Yes.

Mr. Paulson: —to the cement manufacturers' distribution system. I think that is on the record.

Trial Examiner Norwood: It has been shown.

Mr. Seeley: How can he admit that for every Respondent that way?

Mr. Paulson: You certainly do not dispute it as to one Respondent and try to prove it as to the other. You want to prove the point. Mr. Wooden says, "I concede the point."

I think I am correct on the record on that, so there is nothing more at issue.

28572 Trial Examiner Norwood: I do not think there is any evidence to the contrary that the manufacturers—the main part of their business, the substantial part, is through dealers; that it is a diversified business; that it is more substantial for that reason, goes through many small sources, and does not subject him to violent reactions in the matter of quantity; as between one year and another.

We have gone into that. We know all about that.

Mr. Paulson: I do not think there is anything more clear in the case than that we should not go into the fine percentages of this proposition.

Trial Examiner Norwood: I want to urge Counsel for the Respondents to proceed with the substantial issues here, the important issues, and adduce some evidence on it.

Our time is limited, and if we do not proceed we are going to have to work extra hours, and harder than we want to work to finish this case.

28573 By Mr. Leisure:

Q. Now, as far as your company is concerned, what function do your dealers have in the marketing of your cement, Mr. Elliott, please?

A. Well, they distribute it through the sections where they are located; they handle it, if contractors are asking—a friendly contractor would ask for a brand, they would be able to take care of our brand in that market;

28574 they furnish the—well, the intermediate point between the manufacturer and the customer.

Q. Well, take the large metropolitan areas; do you sell to any large dealers in those sections?

A. Yes, we do.

Q. And do those dealers, in turn, have salesmen of their own?

A. Yes, sir; in some cases.

28575 Q. Mr. Elliott, do your dealers generally sell other brands of cement as well as your own?

A. Yes, sir.

Q. What has been your experience with whether or not your customers are or are not familiar with the cement prices, generally?

A. Oh, I would say the customers are very familiar with the cement prices.

Q. Going to another subject, Mr. Elliott, will you tell us, please, what your experience has been as to at the time you came with the Whitehall Company,—did you make any sales direct, and, if so, how does that compare with the situation today,—direct to customers, of course?

A. Oh, I would say it is not materially different, although, in 1927 and 1928 there was quite a little road work done through Pennsylvania, and most of that was direct; but, generally speaking, I would say it is not an awful lot of difference,—that is more through dealers in later

28576 years than before.

Q. Mr. Elliott, has there been any period when the Whitehall Company did not sell some of its product direct to some consumers?

A. No, sir; there never has.

Q. Mr. MacIntyre asked your some questions about your sales to ready-mix plants, and so forth.

Do the ready-mix plants use dealers at the present time?

A. Some of them do in the larger cities.

Q. Well, now, in marketing Whitehall cement, have you ever followed any so-called plan of classification of business?

A. No, sir.

Q. Have you issued any printed announcements of your sales policy at any time?

A. No, sir.

Q. Do you ordinarily receive requests for quotations from people whom you haven't sold in the past, or have not been selling in your district?

A. We do sometimes.

Q. I ask you whether at any time you had a policy, printed policy, during the N.R.A. period,—did you attempt to follow the marketing plan set forth in the Code?

A. Yes, we followed that.

Q. Well, have you ever had any agreement with

28577 any other cement company regarding the alleged classification of business?

A. No, sir; we have not.

Q. I call your attention, Mr. Elliott, to Commission's Exhibit 1131-J. You will observe in that second paragraph, Mr. Elliott, there is the statement made that the

Lehigh Company and some of those who have joined, that they have been making very strenuous efforts to bring all the members of the cement industry to the Lehigh selling plan.

To your knowledge was any such effort as described in that paragraph made toward you or your company, to your knowledge, in any way?

A. No, sir. We were never approached, and we never followed the plan.

Q. You will observe in the third paragraph there is a meeting mentioned. Did you attend that meeting?

A. Yes, sir.

Q. Do you recall any such request as is described in that paragraph having been made by Secretary of Commerce Lamont at that meeting?

A. About the Lehigh plan?

Q. I am referring to the third paragraph.

A. No. Secretary Lamont wired me and invited me to come down to this meeting. The only thing mentioned at the meeting that I recall was that he said that
28578 President Hoover hoped that the industry would not reduce wages, as he felt that conditions were getting decidedly better.

Q. I want to call your attention to another Commission's Exhibit, 1131-N.

You will observe in the fifth paragraph it is stated Mr. Johnson stated that some cement manufacturers that had adopted the sales plan are not following it in practice.

Do you see that there?

A. Yes, sir.

Q. Did you adopt that plan?

28579 A. No, sir.

Q. Taking up the subject of diversions, Mr. Elliott, do you have any policy with regard to diversion of your cement in transit?

A. Well, we would not want to permit diversions, but we have had very little trouble on that score.

The witness identified Resp. Ex. 1633 as a copy of the contract with the Whitehall Cement Manufacturing Company. Whitehall uses only one form of sales contract, a form which has been used ever since he has been with the company with the exception of the Code period;
28580 Resp. Ex. 1634 as a specific sales order which was used during the Code period; Resp. Ex. 1635 as an

acknowledgment of the order, which might come into the office by mail, telephone or letter; Resp. Ex. 1636
28581 as a sample quotation of a specific job; Resp. Ex. 1637 as a sample quotation for a price on one car
28585 for immediate delivery. Resp. Ex. 1633 to 1637
28586 are forms used by Whitehall in the regular course of
28587 business, or were so used at one time.
28588 (RESP. EXS. 1633, 1634-A, 1634B, 1635-A, 1635-B, 1636-A, 1636-B, 1637-A, and 1637-B were offered and received in evidence.)

By Mr. Leisure:

Q. I want to show you Commission's Exhibit 749-W (indicating).

You will observe that your company is named in the list here as being one of the companies as indicated by the exhibit as using that stamp.

Do you or did you ever carry such a stamp on your
28589 bills-of-lading?

A. No, sir; we never did.

28596 Q. Well, the point of my question, Mr. Elliott, and that was preliminary, how long have you used the terms, which we will not take time to read all of the forms, we can find what they are, how long have you had those?

A. Ever since I have been with the company.

Q. I call your attention to a group of Commission's exhibits, Mr. Elliott,—I have reference to 409-J, 409-O, 409-Q, 409-M, 409-L, 409-N, 409-R, and 409-P.

There are a number of filings here which purport to be a summary of prices filed during the Code period.

As far as your company was concerned, did you have any restriction placed on you under the Code upon the kind of prices that you could file?

A. No, but we did have to file them.

Q. And if someone else filed a price, was there any requirement that you must quote the same price?

A. No, sir.

Q. In your experience did the Code Authority attempt to control in any way the prices that you would file?

A. No, sir.

Q. What about the terms and conditions of sale,—was there any restriction placed by the Code with respect to that?

A. No, sir.

28597 Q. At the present time, Mr. Elliott, do you file any prices with The Cement Institute?

A. No, sir; we do not.

Q. I call your attention to Commission's Exhibit 179. It seems to be an order permitting Code members to file prices 15 cents below their published price on Government projects if they chose, and also I would like to call your attention at the same time to Commission's Exhibit 598-D, which has reference to a meeting of the industry held on July 10, 1934.

Those exhibits, Mr. Elliott, indicate that in July of 1934 this public hearing took place under the auspices of the N.R.A. concerning that order.

Did you attend the meeting?

A. Yes, sir.

Q. What was the attitude of your company and your attitude toward that order at the time?

A. We never availed ourselves of the 15 cents below.

Q. What was your—

A. We felt that our cost and our prices were going to be unionized, and we felt that that was too low to take the business if the conditions continued to go up the way they looked as they would do at that time.

Q. Did the order modify the Code?

A. Yes, it did modify the Code.

28598 Q. Well, with respect to your previous answer, I want to call your attention to 637-B and ask you if you met the labor provisions of the Code?

A. We did meet the labor conditions of the Code, and had already met them when the Code was put in force; at least we were in line with the conditions of the Code when it went into effect.

Q. You had put those in effect prior to the Code?

A. Yes, sir; our rate of wages was higher than the Code demanded.

Q. Do you feel that the Government is entitled to any special concessions in prices?

A. No, sir.

Q. Did you have any agreement with any cement company or group of companies that you would not take advantage of this privilege of quoting below that published price?

A. No, sir.

Q. In deciding whether you would or would not, Mr.

Elliott, offer the Government any concession with reference to that order, did you consult any of your competi-
28599 tors about the action that you took?

A. No, sir.

Q. Referring to that exhibit, 637-E, was that plan anything new, as far as your company was concerned?

A. Yes, it says here, "all Portland cement will be marketed in each community only to or through the recognized established building material dealer or dealers."

Q. Yes. You are now referring to Article XI?

A. Yes.

Q. Yes, but my question was whether or not there was anything new or novel, as far as your company was concerned?

A. No, sir.

Q. Was there any—let me see that.

(Witness hands document to Mr. Leisure.)

Q. What was the line that you referred to, please, Exhibit 637-E, I believe?

(The witness indicates the portion referred to.)

Q. Calling your attention to Commission's Exhibit 561, did it have any effect, and, if so, explain what effect on the marketing practices of your company?

A. It had no effect at all on our company.

28600 Q. I think you have told us, Mr. Elliott, that your method of marketing has been to sell at delivered prices since you have been with the Whitehall Company; is that correct?

A. No, from about—it was really delivered price, but that—we made it up by a mill price plus sacks and plus freight, but that only had, as I remember it, in about 1922 or 1923, in through there. Our method of making up the price was to say so much at the mill and 40 cents additional for sacks, and so much additional for freight, and then add it up, and some of the customers said that it was—they did not want to have to figure it up, they wanted the price, and as the requests came in we gradually changed over until we had a destination price; that is, we showed it as a destination price and did not break it down.

Q. All right.

Now, do you have any requests from any of your dealers today for quotations f.o.b. mill?

A. No, sir.

Q. Now, when you were quoting a mill figure and show

ing the freight separately and quoting your price in that way, did you meet competitors' prices at destination?

A. Oh, yes, sir; we had to.

Q. You say you do not as to the location of your present mill. Do you have any market at your present mill?

A. No, practically none.

28601 Q. I want to call your attention to some Commission's exhibits in the form of tabulations of bids, and without taking them up one at a time I am going to try to group them, Mr. Elliott, and ask you to look through them at one time preparatory to a question.

They are as follows: Commission's Exhibits 387-A to blank; 1099-R, 267-B, 386-G, 14-A and B, 10-A to E, 28602 9-A to C, 1099-D, 1099-M, 383-A to blank, 382-A to blank.

Will you glance at all of those, please?

I would like to include in the group 15-A to GG.

(The witness examines documents.)

Q. Have you looked at those exhibits?

A. Yes.

Q. Can you tell us whether or not your company bid on those lettings represented by those exhibits?

A. We did bid, yes.

Q. Now, will you tell us how your company arrived at its quotation on those invitations from the various Government and State bodies?

A. Well, the same way as we would arrive at our usual quotations; some of them we may have bid on before; we have been—at that time we may have been bidding on quite a few of those. It is not an unusual bid, as I see it here.

Trial Examiner Norwood: Well, how did you arrive at it?

The Witness: Well, we would take the last price that we had, a price on our card, and if we were going to 28603 bid on it we would make that price governing the point of shipment that we were asked to make in the bid.

Trial Examiner Norwood: How was that price made?

The Witness: By the last price we had in, the current price that we would know about, and from our card index. One of these, for instance, was in Philadelphia, Pa., as I see it, and we are bidding there most every day.

By Mr. Leisure:

Q. Does your company quote to the Federal Government on a different basis than it uses in the case of commercial business?

A. No, sir.

Q. Has it quoted to any State, county, or municipality on any different basis than it uses for regular commercial business?

A. No, sir.

Q. You referred to a customer's card.

I would like to ask you whether or not the prices which you quote to the Federal Government and to the States and other public bodies, whether or not they are figured on a different or in the same manner as you have described with respect to your prices to commercial customers?

A. Figured on the same.

28604 Q. When the Government or State calls for bids at a series of destinations, do you check the price, or do you not, at each and every destination, before you quote?

28605 A. We would check the price at each destination at which we quote; but sometimes we don't quote on all the points asked for in the bid; we may only quote on part of the bid.

Q. Where do you obtain that information for checking from?

A. Well, from our—it is usually a point where we have quoted before; we have it in the daily run of business.

Trial Examiner Norwood: That is, it is reported to you from the field?

The Witness: Yes, sir; we have our regular knowledge of what the price would be; we are quoting the same points practically—not every day, but continuously.

Trial Examiner Norwood: Your salesmen report to you?

The Witness: Yes, sir.

By Mr. Leisure:

Q. Other than that, do you have any assurance that there have been no changes, or as to what the market price is at destination?

A. Well, if there were a change we would hear it very quickly, somebody would either call us up or we would get word of it.

Q. But my question is, whether you had any other information other than what you have got in the way that you have just described?

A. No, sir; not at all.

28606 Q. On your sales to the Government which you have described, where is your market when you sell to the Federal Government?

Mr. MacIntyre: Wait a moment.

A. At the destination.

Mr. MacIntyre: Just a moment.

Your Honor please, I move that the question and answer be stricken; it calls for the conclusion of the witness as to an economic concept of the location of markets.

28608 Trial Examiner Norwood: The objection is sustained.

He may tell us where he contracts to deliver it, where he ships it from, at what points he quotes it, and so forth.

By Mr. Leisure:

Q. Mr. Elliott, in your sales to the Government, where do you meet your competition?

A. At the point of final delivery.

Mr. MacIntyre: I had moved that the question and answer be stricken.

Trial Examiner Norwood: The motion is allowed to strike the answer to the previous question.

By Mr. Leisure:

Q. I want to call to your attention another Commission's Exhibit 352-A—

Mr. MacIntyre: What is the number?

Mr. Leisure: 352-A to D.

By Mr. Leisure:

28609 Q. —which deals with the cost of selling to the Government as compared to commercial business. What has been your experience? Would you say that the Government—that you can sell cheaper to the Government than to commercial customers, because of your cost?

A. No, sir; I would say we couldn't.

Q. Does that mean when you sell to the Government on a large order, and sell to one of your customers on a large order,—does that apply to all of your customers?

A. It wouldn't make a lot of difference, because usually the Government requires a certain specification, and it is

different from what we are making at our mill, that would make quite a little difference.

Q. Is the Federal Government a large or small customer of the Whitehall Company?

A. A very small customer.

Q. Well, of course, that is a comparative term, a small customer.

28612 Q. Has there ever been any year when the Gov-
23613 ernment has purchased any large percentage of your shipments?

A. No, sir.

Q. You said that the Government purchases were relatively small percentage of your business. What did you mean by small? What do you mean by a small percentage?

A. I think I said very, very small.

Q. Yes. What do you mean by that? What percentage, for instance?

A. Well, around one percent, I would say; not over two.

Q. Now, coming back to this Exhibit 352-D, again, how do your sales expense in connection with sales to the Federal Government and to other public authorities compare with your sales expense on ordinary commercial business?

28615 A. I would answer that, while the bid might be asked and involve no particular sales cost in the sense of sending a salesman to get that order, in our company it may have been quite an additional cost to us in the way we had to manufacture the cement, the way it was tested at the mill; we would have to set aside special bins and it might mean we would lose a commercial order if we had a large quantity of Government cement in bins. It was business that up until 1928 or 1930 we hardly took any Government business at all because we were able to get commercial business, and we felt it was more desirable.

By Mr. Leisure:

Q. In that connection does the Government sample the bin before each order?

A. No, sir. If you bid on it then you get permission to set that cement aside; that is, granting you are awarded the order, and if you can't set it aside of course you may lose the order anyhow, and if it is not set aside in time, they may go into another mill which has the cement tested; you may lose part of the order; then you have that cement to dispose of.

Q. Do Government jobs require as much service, more or less, than the ordinary commercial job which you get through dealers?

28616 A. I would say they require more service.

By Mr. Leisure:

Q. Is there any advantage to Whitehall in the fact that the Government pays cash, Mr. Elliott?

A. No, sir; because sometimes we have to wait for our money there.

28617 Q. Do you make any shipments to the Government which are not on Government bills-of-lading?

A. We use our own bill-of-lading; we do not use the Government's.

Q. You use your own bill-of-lading?

A. Yes, sir.

Q. Do you prepay freight on such shipments?

A. No, sir; I don't think so.

28618 Q. Do you recall any such discussion as that described there in Exhibit 637-K to Q?

A. I recall a discussion. They had authority to 28619 present such a plan for allocation.

Q. After this meeting and after the committee was discharged, do you recall any further activity about a plan for sharing available business?

A. No, sir; I do not.

28620 Q. Well, I will start again. There is a Commission's exhibit in evidence, Mr. Elliott, No. 637-V, in which a resolution was offered—

Mr. Paulson: I object.

Trial Examiner Norwood: Now, that is just what I do not want. You ask him whether or not he attended such and such a meeting on such and such a date, and what was said there, and see what he remembers about it, and see whether it is true or not true, without regard to any exhibit, or what any witness testified to, or what he has testified before.

We are trying to find the facts in the case here.

By Mr. Leisure:

Q. Did you attend any meeting in February, 1935, during the Code period, at which meeting a resolution was offered to appoint a committee to wait on the New York State Highway Department with a request to change specifications 15 and 15-S to conform to present standard specifications?

A. Yes, sir.

28625 Q. Did you attend the meeting—did you attend any meeting of the members of the Northeastern Division at the Hotel Biltmore in New York at any time during the year 1935?

A. Yes, sir.

Trial Examiner Norwood: When was that?

The Witness: What date?

Trial Examiner Norwood: Yes.

The Witness: I could not answer that. I attended several meetings during the Code period.

Trial Examiner Norwood: Was this meeting you spoke of during the Code period or afterwards?

By Mr. Leisure:

Q. Did you attend any meetings at all after the Code period?

A. I may have, one or two.

Q. Of the Institute, I am talking about.

A. I may have, one or two, I don't know.

Q. What do you understand by the Code period?

A. Well, really up until last—well, about a year after the Code, because there was some—the actual Code went out, but then there was some talk and quite a little 28626 argument about some further legislation, and that was our reason for continuing in the Institute.

28628 Q. Do you know whether or not, Mr. Elliott, since 1935, that you have just told us about a moment ago, whether or not the New York State Highway specifications have been changed?

A. Yes, sir; they have.

Q. Has it been changed more than once, do you know?

A. Yes, sir; several times. There have been additional items added to the original specification.

Q. And as to those different changes, do you know, of your own knowledge, how they compare with the standard specifications—

A. Well, they are quite different.

Q. —of Portland cement?

A. In our case, they are very much more expensive to make than standard cement.

Q. Do you recall having attended any other meeting that same year?

(Long pause.)

Trial Examiner Norwood: Answer the question.

A. No, sir; I do not.

28629 Q. Well, do you recall any meeting at which you discussed the New Jersey—any meeting where you discussed the Gage specifications?

A. Yes, sir.

28631 Q. Did you make a motion at the meeting that I have just referred to, with regard to this Gage matter?

A. Yes, sir.

Q. And what was the position of your company 28632 with respect to that?

A. We didn't want to make the Gage specifications.

Q. Why not?

A. Well, it entailed quite a little expense, and the addition of another material which changed the color of our cement, and we had to clean all our conveyors, and all our mills each time that we made those specifications, and the cement which would be made up to the time that it became possible to pass those specifications would be of a different color than our usual cement, and not marketable in the usual way.

28633 Q. Was the Gage specification the same or different from the New Jersey State specifications at that time?

A. It was different.

Q. Have you, or any representatives of your company ever been officers of The Cement Institute?

A. No, sir; they have not.

Q. Or trustees of The Cement Institute?

A. No, sir.

Q. Have you, or any of the representatives of your company, to your knowledge, attended any meetings of the Cement Institute since the Code period?

A. No, sir; they have not, not to my knowledge.

Q. Do you recall having received the invitation 28634 represented by that Exhibit No. 1309?

28635 Q. Will you look at the exhibit, please, and tell us whether you bid on it (indicating)?

A. No, sir; we didn't bid on it.

Q. Why not, Mr. Elliott?

A. Well, now, it required, as I remember it, three different kinds of cements, one of which we were not prepared

to make at all, and it was more or less in the nature of an option, in the sense that if we bid on it we had to be prepared to furnish the cements which were outside our regular line of making, and if we didn't get the business we would have no market for at least one of the cements that was asked for in the bid, and it was very vague as to whether delivery would be required, and when.

Q. Did you have any contact with your competitors, or any agreement, before you decided what action you would take?

A. No, sir; we did not.

Q. In this bid?

A. No, sir.

Q. Have you had any requests for bids f.o.b. mill, other than the request from the Federal Government?

A. No, sir; we have not.

Q. Can you tell us when the first time was that you received requests from the Federal Government for f.o.b. mill bids, prior to the date of this exhibit that I just handed to you?

A. Well, I would say it was within a year, or
28636 15 months, as I remember it.

28637 Q. Mr. Elliott, Commission's Exhibit 1399 is another invitation to bid. Did you bid on that invitation, please?

A. No, sir; we did not.

Q. And 1394 is another invitation to bid. Did you bid on it?

A. No, sir; we did not.

Q. Why didn't you bid on those two invitations, Mr. Elliott?

A. Well, one is entirely out of our territory where we normally bid, that is 1934; and the other is a bid which calls for cement of a test that we did not care to make at that time and were not making.

Q. You say of a kind that you did not care to make,—what kind is that, please?

A. It is C-191-A.

Q. Is that tri-calcium aluminate cement?

A. Yes, sir.

Q. I would like to call your attention to Com-
28638 mission's Exhibit 2756, numbered 1 to 21, and ask you how you arrived at the prices in those exhibits?

A. We followed our usual custom. We knew what the

market was in most of these points, and we were quoting right along. We had the price and we did not do anything different in making these up than we ordinarily would do in the usual course of business.

Mr. Leisure: I ask to have marked for identification a letter bearing date of March 20, 1963.

(The document referred to was marked for identification "Respondents' Exhibit 1639.")

By Mr. Leisure:

Q. Did a Commission investigator call at your office at any time, Mr. Elliott?

A. Yes, sir.

Q. Will you look at Commission's Exhibit 1639 and tell us whether or not that was taken from your office by an investigator; if so, tell us when and where and under what circumstances?

A. Well, this seems to have been taken by Mr. Giblin.

Q. What is it, please? Just identify it so that I can offer it.

A. It is a quotation from Lone Star Cement Company of Pennsylvania.

Q. Can you tell us whether or not you met the 28639 price which is represented by our Exhibit 1639?

A. I do not know what the exhibit is.

Q. Well, look at it so that you will know what it is.

A. No, I do not think we did. As I remember this price, it was not in effect very long.

Q. Where did this exhibit come from, if you know? How did it come to your office?

A. I would not know that. I would imagine Mr. Giblin got this from our dealer file.

Q. And how did it get to your dealer file, if you know?

A. I would not know how it got there.

Q. But it was in your dealer file?

A. Yes, sir.

Mr. Leisure: I offer it in evidence (handing document to Mr. MacIntyre).

Mr. MacIntyre: I would like to ask Mr. Elliott a question about this.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Do you know, Mr. Elliott, whether or not this Respondents' Exhibit 1639 is in the form in which you first

saw it as to whether or not it is a copy of the quotation of the Lone Star that might have come into your possession, or was it in that form when it first came to your possession?

A. That I could not answer.

28640 Q. You do not know whether it was a copy made in your office, or someone else's office?

A. No, sir; I would not know that.

Q. Well, Mr. Leisure asked you some question about a Mr. Giblin taking it from your files. Well, do you know what file he might have taken it from when he borrowed it from you?

A. He would take it from our dealer file.

Q. Do you know what dealer's file?

A. No, but we would have these quotations in our file, and he took whatever he wanted. We turned the files over to him.

Q. You do not know from what file of yours he took this, then?

A. No, sir; I would not.

Q. And you do not know how it came to get into your files in the first instance?

A. No, sir; I do not.

Q. Nor from what source your company secured it?

A. No, sir.

Q. Or whether it was in this form or not when you secured it?

A. No, I could not tell you.

28649 *Cross-Examination by Mr. MacIntyre.*

Q. Mr. Elliott, just a few moments ago Mr. Leisure showed you an invitation that you had received from the Federal Government, Commission's Exhibit 1394, calling for bids on 5,000 and 12,000 barrels of cement, in two lots, indicating on the invitation that the cement was to be used in Ohio and West Virginia, and the bids to be opened, I believe, on May 5—or the invitation is dated May 5—do you recall that invitation?

A. I recall it.

Q. I believe you stated that the reason you did not bid on that was because the cement was to be used out of your territory. Do you know how?

28650 A. No. I said that it was out of our territory and we did not want to bid on it for that reason.

Q. What did you mean by your statement "out of your territory"?

A. Well, what I really meant by that was that it was so far away that our mill net would not be satisfactory to us at that time, plus the fact that the specification—

Q. Well, what do you mean by being so far, when you used that expression?

A. Well, we haven't gone into Ohio. We haven't shipped into Ohio, I would say for about ten or possibly twelve years, because the mills in the West and in Ohio have a much better freight rate, and if we shipped out we would get very much less for our material.

Q. The terms of that invitation, however, were to the effect that you were not to ship the cement anywhere; they were asking for a bid f.o.b. Cementon, Pa., weren't they?

A. Yes, but if we did that we could not give a bid knowing it was going into Virginia or Ohio because the freight from our mill into that point, Virginia or Ohio, would be so high that we would not be able to compete; in other words, I imagine that our freight rate between points in West Virginia and Ohio would be 30, 32 cents higher.

Q. Could you have competed less by bidding an f.o.b. mill price at your mill on that than was the case by
28651 your not bidding at all?

A. I do not think so.

Q. Well, did you have any less chance of getting the business by submitting a price that would have netted you a reasonable profit at your mill than was the case of your not submitting a price at all?

A. Well, I do not think we would have had any chance of getting the business because if it was going to be used in Ohio or West Virginia the Government would have to pay the freight from our mill to the point where it was going to be used.

Q. Well, since none of your competitors bid on that, since neither you nor any of the other manufacturers bid on that particular invitation, if you had bid and the others had not bid, you would have stood a fairly good chance of getting the business, don't you think?

Mr. Leisure: I object to that.

Trial Examiner Norwood: Overruled.

Mr. Leisure: Speculating as to what might have happened.

Trial Examiner Norwood: The objection is overruled.

By Mr. MacIntyre:

Q. Since none of your competitors had bid on that, if you had bid do you think you would have as much less opportunity of getting the business than by not bidding at all?

28652 A. I do not believe that, leaving the freight and everything else aside, we would have bid on it.

By Mr. MacIntyre:

Q. Why?

A. Because it was a specification; as I said in one of my other talks, we very seldom bid on Government work. That has been our history all the way back because it is a rather difficult thing for us to handle at our mill.

Q. I understood that reason that you raised, Mr. Elliott, to apply to 1339. I did not understand that to apply to 1394.

A. It applies to everything, sir, that comes out of our mill except the Portland cement. The way our plant is constructed, if we have to make any specifications that are different from what we call a standard cement, it is difficult for us to make it and handle it. If you want me to go into the mechanics of it, I think I can possibly clear it up in your mind.

Q. I do not think it is necessary to go into the details of the manufacture. I am attempting now to get at the basic reasons for your not bidding on this Commission's Exhibit 1394.

A. Well, on any Government bid that would be our very great basic reason because we have six kilns, and if we feed out of a given spout it necessitates our running

28653 on that one specification up and until the time we can make enough cement to pass such specification, and then we change our mix and whatever mechanical changes have to be made back to the time when we can go on either to another specification or standard cement.

Q. Isn't that true of all special specifications that you —specially specified cement—that you sell to the Government, Federal Government?

A. Yes, but we haven't sold all the specifications that the Government have asked for.

Q. Well, when you do sell the Government cement, that is the U. S. Government, cement on special specifications, you have that problem, don't you?

A. Yes, sir.

Q. And you do in most instances sell them when you know where the cement is to be used; isn't that true?

A. No, sir; it is not.

Q. You do bid on cement?

A. We do bid on cement for the Government, yes.

Q. Special specifications?

A. Yes. Well, on the standard United States Bureau of Standards' specification, but I think in one or two instances only have we bid on the other specifications.

Q. And you knew in those instances where the cement was to be used, didn't you?

28654 A. Yes, sir.

Q. That is, the particular locations?

A. Yes, sir.

Q. And found yourself in a position to bid a price there that was no different when they were open than the prices bid by your competitors; isn't that the case?

A. Well, that I could not answer because we would not know when we bid it what the prices were going to be.

Q. Well, they turned out to be the same as your competitors?

A. Well, if that is a matter of record, yes, they did.

Q. I will show you Commission's Exhibit 336-G, Mr. Elliott, the one Mr. Leisure asked you about this morning. Do you find that you bid the U. S. Navy Department Bureau of Supplies and Accounts on that occasion, didn't you?

A. Yes, sir.

Q. And the tabulations of the bids show that practically every Navy Yard you bid the same as your competitors?

A. Yes, sir.

Q. In one case you did not bid; that of Newport, R. I.

A. Yes, sir.

Q. Now, how did you make up your bids in that instance, Mr. Elliott?

A. Well, I imagine that possibly we had the—we did not guess the price right. We figured it back from what we had, and it was wrong as far as the bids went.

28655 Q. Figured it back, from what, do you mean?

A. Well, very possibly we had a price at that point which we felt was the price, and if it turned out to be different we evidently did not have the destination price that somebody else had put in late enough to get that bid.

Q. Well, did we understand you to say, when Mr. Leisure asked you about it on direct, that you learned of prices in the field by picking them up; that is, the prices your competitors are quoting?

A. Yes, sir.

Q. Well, how is it that you did not bid the price that your competitors did in that instance for Newport?

A. Well, it may have been an error; it may have been that we did not have the price in the field at that time; maybe we had a price that existed before and used that.

Q. Well, when you speak about bidding a price that you find in the field, what must be the features of that price before you will bid it, Mr. Elliott? That is, in a bid of this kind?

A. Well, if we found a price in the field and figured it back and thought it was desirable business, and the specification was all right, we might bid on that specification granting we did not have work at the mill that required too much of the cement in question, or that we wanted the business at that time.

28656 Q. If you found one of your competitors quoting $2.31 at this particular destination, and all the others $2.51, what price would you have bid?

A. If we wanted the business we would have bid possibly $2.31 or lower.

Q. You would not figure that he had made a mistake in figuring back from the common basing point on that?

A. No, sir; we would not, not if we wanted the business.

Q. Isn't it a fact, Mr. Elliott, that in many instances where you do figure destination prices from a common basing point or figuring point, that you find that someone has made an error and is two or three cents below the price you figure as the applicable price there, and instead of using that lower erroneous price that they have figured, you use the higher one; isn't that a fact?

28658 A. It would make no difference. We would not consider it an erroneous price; if we found a price and wanted to meet it we would meet it, for, as I say, in some cases we might even go below.

By Mr. MacIntyre:

Q. Now, in filing these prices that were shown to you by Mr. Leisure as having been filed with The Cement Institute back three or four years ago, you filed them for each and every destination in which you "are soliciting business"?

A. Yes, sir.

Q. Isn't that true?

A. Yes, sir.

Q. How did you determine at each of those destinations what prices to file?

28659 A. Well, we filed the prices which we had. They asked to file prices right after the Code was drawn. We sent in our list of prices as of the time that they asked, and then we kept adding to them.

Q. Well, you filed for each and every one of the destinations at which you solicited business?

A. Yes, sir.

Q. Did you have information from each of those destinations immediately before you as to what you would then sell cement at each of those destinations?

A. I would say we would have a pretty complete record because our salesmen are covering the field; we are doing business with those same customers most every day.

Q. I am asking you about absolutely complete now.

A. I do not think your list could ever be absolutely complete.

Q. How did you make it complete in the filing of your prices?

A. We filed what we had or what we filed, and then we kept filing as the conditions came up. For instance, we might quote a town and we might quote that town every day for two weeks, and we might not quote it for two or three weeks, but our business is pretty much the same.

Q. Isn't it a fact that in determining some of your destination prices that you will quote that you have used a common figuring point in arriving at that price

28660 irrespective of the fact as to whether you have any definite information from the field as to that particular location?

A. No. I would say not. We have the information and figure it back. It might come back to a common figuring point and we would know if we had two or three of them in that section that it was a common figuring point.

Q. And then you would use that in figuring the destination prices you quoted at other nearby destination points?

A. Yes, sir.

Q. Isn't that the method that you used in computing the prices that you did file with The Cement Institute about which we have been talking—that is, in some instances where you did not have it directly from the destinations involved?

A. I would say in most of these destinations the prices which we filed at the time that the Code became operative were places that we were shipping or at least had quotations out on at the time we made the list. That would be my impression of it.

Q. I am now asking you about not most but about all.

A. Well, of course, I did not handle each individual price, but I would say that that is our custom, and I would say that nobody would deviate from it.

Trial Examiner Norwood: Well, were some of the points that were covered by prices that were figured from this common figuring point?

28661 The Witness: Very possibly, yes.

Trial Examiner Norwood: As revealed by the definite prices that you had found to be at other points?

The Witness: Yes, sir.

By Mr. MacIntyre:

Q. Mr. Leisure has questioned you about the cost of selling to the United States Government as compared with the cost of selling other customers.

Are you now prepared, Mr. Elliott, to state—to testify here that an order from the United States Government for 500,000 barrels of cement given to you as the result of an invitation that they sent you in your bid and pursuant thereto causes you to incur as much selling cost per barrel on that order that you would get as a result thereof as would be the case in instances where your salesmen called on dealers all over your territory and solicited carload business in single cars?

A. Well, if we had to take the order of 500,000 barrels, I would say it would cost us very much more because it would put us out of business with our commercial trade. Now, if the Government would continue to guarantee that they would give us orders—

Q. Well, let's cut the size of the order down and say

100,000 barrels. I want to know how much business you really desire, Mr. Elliott, as to whether you want a hundred thousand or two hundred thousand or five hun-
28662 dred thousand. Suppose that they offer you a hundred thousand barrels, what effect would that have on the cost?

A. That would cost us quite a little money to furnish to the Government unless—

Q. Do you think it would cost—

A. (Continuing.) —unless they would take our common run of cement, and, even then, it would cramp us very much, because we couldn't have an order for a hundred thousand barrels to the Government, where you have an inspector coming to your mill and only load certain hours during the day, and take care of the commercial business in the same ratio. Now, your commercial business is the thing which you almost have to depend on for the future.

Trial Examiner Norwood: Isn't there any cost saving for large quantity orders?

The Witness: There would be if it were standard cement; yes, sir.

By Mr. MacIntyre:

Q. I believe you stated just a moment ago that if the Government did give you a five hundred thousand barrel order that it was likely to put you out of business because you would have to give up other business.

Isn't it a fact, Mr. Elliott, that you do have one customer, in commercial trade, that buys from you approxi-
mately a half million barrels a year?
28663

A. Yes, sir.

Q. And you furnish him without putting you out of business with respect to your other customers, don't you?

A. Yes, but that is possibly in that half million barrels, Mr. MacIntyre, that might represent fifty to a hundred different operations, they move at different times, they move at different speeds, and it only requires so much per day to take care of that.

Q. Well, I assume when I said 500,000 barrels to the Government, that they wouldn't want it all in one day, that they would take it over a period.

A. Well, sometimes—

Q. Just as your customer you are now referring to takes a half million over a period.

A. Yes, but there is quite a little that we can't take from him, for the same reason.

Trial Examiner Norwood: Well, is there any cost saving on his large volume of business?

The Witness: Yes, I would say there was.

By Mr. MacIntyre:

Q. Now, in your discussion with Mr. Leisure concerning your dealer policy, and what classifications of business that you sold through dealers, I don't believe it was brought out whether or not that your dealer policy leads you
28664 to sell through your dealers cement that is used on W.P.A. projects.

Will you please inform us on that?

A. Yes, sir; we sell them through dealers, dealers handling a great deal of that.

Q. You do not sell it direct to the Government?

A. No, sir.

Q. Even if they invited you to bid on that?

A. Well, I would say that that would depend entirely on where the business was, and the dealer we had at the point at which it was going to be used.

Q. Well, let us take this city, New York City, an invitation sent in to you to bid on a W.P.A. project, that is, for furnishing three carloads, regular cement,—what is your reaction to that?

Trial Examiner Norwood: What is your policy today with regard to that?

28665 A. I would sell that through the dealers.

By Mr. MacIntyre:

Q. You wouldn't sell them direct?

A. No, sir.

Q. Why wouldn't you sell that direct, Mr. Elliott?

A. Well, we would be getting into trouble with the dealer. It possibly might be some business which he might think that he should get just as satisfactorily; and, another thing, in New York all business has to be trucked. You would have to go into the trucking business, really, to supply it to the W.P.A., in a manner in which they most wanted it. It has to be hauled to different points, and I wouldn't be equipped to do that, if they would. They never have, to the best of my knowledge, in New York, taken cement in carload lots, it was always hauled to some point.

Q. There are points where the Government has invited you to bid on W.P.A. projects where they did want it f.o.b. cars at particular places; isn't that the case?

A. There may have been; I don't remember it.

Q. In those instances, why wouldn't you sell direct? It wouldn't require you to do any trucking in those particular cases?

A. Well, on account of my dealer connection.

Q. What functions, if any, in such a case, can a dealer perform to benefit economy, in the handling of his
28666 cement, where it is shipped directly to the siding, where it is to be used.

A. Well, the dealer is called upon to deliver cement at all hours of the day, and in some cases at nights; he may be called upon to deliver a large quantity—

Q. I am talking about such a shipment as that; I am not talking about other business now.

A. Such a shipment as what?

Q. Carload shipment direct to a siding where the project is located, and on which the cement is to be used—

Mr. Leisure: Your Honor pleases—

Q. —by the Federal Government?

28667 A. In a great many cases the cars later get bunched, and they cannot be delivered in time, and the W.P.A. will want the work to carry on in between, they may be getting other materials, and, especially in New York City, where you have a congested traffic situation, it is quite often the case that cars get bunched in ten and fifteen carlots.

Trial Examiner Norwood: Yes.

The Witness: And unless a dealer had some sort of a stock, or some sort of a way of helping them out, I imagine that they would lose quite a little money on the project.

Mr. MacIntyre: We are talking now about the car that gets there on time. What service or function does he render with respect to that car. We are not talking about the other situation, Mr. Elliott. We are talking about the car, now, that gets to the siding at the time the customer wanted it there.

Trial Examiner Norwood: Well, he has explained that
—the dealer is giving an emergency service when
28668 they have carload lots on order and in transit.

By Mr. MacIntyre:

Q. The customer is, of course, always privileged to order out of the dealer's warehouse, too, but at times they do not so order, and Mr. Leisure called to the witness' attention two invitations for the Government to bid—for him to bid—on W.P.A. cement without the dealer participating, that Exhibit 1394 and Exhibit 1399, that was W.P.A. cement.

Mr. Seeley: Your Honor ruled that all further reference to Commission's Exhibits 1063, and related matters in which—whereby the Procurement Division, Procurement offices, had put in these test cases, knowing that they would not receive bids, should not be made—no further reference should be made to those.

Mr. MacIntyre: Oh, no.

Mr. Paulson: No.

Trial Examiner Norwood: How is that?

Mr. Paulson: No.

Trial Examiner Norwood: I do not think that Counsel is quite straight on that.

Mr. MacIntyre: I would like to get from the witness, if Your Honor please, an answer to the question as to what functions that are performed by the dealers, of which he has knowledge, on the shipment of a carload of cement by him.

28669 Trial Examiner Norwood: He has given one; he has given an emergency service.

The Witness: I think I can give you another. In a great many cases an operation like that is off on a private siding, and it is possible for the dealer sometimes to place the material on a siding, where possibly he has a yard, and from which the W.P.A. could haul, if they wished, from that point.

That has happened in a number of instances.

I cannot answer your abstract question, because I don't know; it has never come up to me as a proposition.

Trial Examiner Norwood: Aren't you familiar with the services that your dealers render to these consumers?

The Witness: Yes, sir; yes, sir.

By Mr. MacIntyre:

Q. I believe that Mr. Leisure, when he was discussing that question with you, got an answer from you to the effect that the payment had something to do with it?

A. Very much.

Q. Have you found that the Government, in paying its bills, has failed at any time in meeting its bills that it owed you, beyond the period of grace?

A. We have always been paid. We have had some discussions; we have waited for our money. If that answers your question.

Q. Well, you were paid within a period of grace,
28670 probably not discounted, but within a period of grace as allowed, were you not?

A. Well, 90 days sometimes.

Q. In that respect, do you think that the Government's credit is anything inferior to that of the dealers?

A. Oh, no, not at all, sir.

Q. With respect to Respondents' Exhibit 1633, Mr. Leisure asked you some questions concerning diversions.

A. Yes, sir.

Q. And whether or not you permitted diversions in transit.

A. Yes.

Q. Just what is your policy with respect to diversions in transit, Mr. Elliott?

A. Well, if we knew of it; we would try to prevent it.

Q. Why?

A. Well, if we ship cement, for instance, to one town, and a man diverted that, you might lose a good dealer in the town to which he diverted, and you never would know just where that would end.

Q. Well, why is that important to you?

A. Well, if a man diverted a car of cement into a town where you had a very good dealer, he would be right on your back as to why you were permitting another fellow to ship a car of cement in to his town when he could take care of it, and had always taken care of it, and would
28671 do it again, and the result would be he wouldn't buy any more from you.

Q. That is, he wouldn't want anyone else invading his territory.

A. Interfering with his business; yes, sir.

Q. Does the matter of price structure at those destination points involved have anything to do with your attitude on that?

A. It would if there was quite a difference in the two towns, because it could—if we were shipping to one man at a higher price, and the man diverted it into the other town,

he certainly would upset our market, and cause us untold trouble there.

Q. But would it have anything in the way of an effect upon the return that you received for this cement at your mill, whether it was diverted or not?

A. Yes, it would have an effort.

Q. How would it?

A. Well, if it were diverted and shipped into a place we might receive less money for it.

Q. Than the amount shown on your invoice, for the shipment to the original consigned point?

A. No, because if it were diverted there the customer would simply pay the shifting charge, or carry-on charge; but the other dealer would be right on our back on that, because he would claim that the price that he paid
28672 was entirely out of line with the price that we permitted the other dealer to pay.

Q. But it wouldn't make any difference in your mill net—

A. No, sir.

Q. —received, whether it was diverted or not, would it?

A. No, sir.

Q. Just before lunch Mr. Leisure questioned you considerably concerning this executive order 6767, now in evidence as Commission's Exhibit 179—I think the date of it is June 29, 1934—which permitted persons operating under Codes to quote prices to the Federal Government 15 percent below their file prices.

Do you know what I am talking about?

A. Yes, sir.

Q. And I believe that you stated to him that you did not know whether or not your competitors would make any concessions below their file prices in their sales to the Government, after that order came out.

A. That's right.

Q. You did know, however, didn't you, Mr. Elliott, as the result of that meeting of July 10, 1934, as shown by Commission's Exhibit 598-D, what your competitors' attitude was on the question, didn't you—they discussed that as to whether they like it, or did not like it, didn't they?

A. Yes, sir.

Q. And you determined through that meeting
28673 what their attitude was on it?

A. Yes, sir.

Q. That is, that they did not like it?
A. We did not like it, either.
Q. And they told you that they did not like it at the meeting?
A. Well—
Q. There was discussion?
A. There was discussion back and forth. I don't know that they told me directly that they did not like it, but the consensus of opinion was that it was not liked.
Q. Well, subsequent to that meeting, you did not learn of any transaction of you or your competitors taking advantage of it?
A. No, sir; we never took advantage of it.
Q. And you don't know that your competitors did, after that meeting?
A. No, sir; I don't.
Q. I believe Mr. Leisure asked you about your policy, as to selling dealers your cement, if they also handled imported cement.
A. Yes.
Q. And you said you had no policy, especially, of refusing to sell them.
A. We never refused to sell them.
Q. That is, as of the date, one of the Commission's
28674 exhibits, Commission's Exhibit No. 1160-A, that he showed you.
A. We never did at any time.
Q. Well, at the time that that policy was in effect, that espionage and refusal to sell, as shown by that exhibit, back in May, or thereabouts, in 1933, you were not a member of the Institute before that, were you?
A. No, sir.
Q. Up to that time?
A. No, sir.
Q. I believe you told Mr. Leisure that you had never accepted any small quantities—made any sales, through truck deliveries from your plant?
A. That is correct.
Q. And had never had any definite policy with respect to such deliveries?
A. That's right. Well, we had a policy that we didn't want to go into trucking, if you want to call that a policy.
Q. You just did not desire—
A. No, we didn't want the business.

Q. —to sell dealers that wanted to buy at your mill for delivery by truck?

A. That's right; yes, sir.

Q. If a dealer asked for a quotation today, for a truck delivery at your mill, and expressed a willingness to pay you all that was, in your opinion, involved, in the
28675 way of cost,—any additional cost, if any, for loading that truck,—would you be willing to take his business?

A. No, sir; we would not.

Q. Why not?

A. Well, it goes back to the original idea. A man coming there, trucking, today, could only truck, as I see it, one kind of cement, which would be a standard cement; he could not truck any tested cement, because that has to be loaded by the State, or the laboratory representing that work, that would be at the mill.

Q. You wouldn't care to sell him untested cement, either, on that basis?

A. No, because it would slow up all operation in the mill; we would have to take our packers off the carloadings.

Q. You wouldn't want to sell him even if he were willing to compensate you for that?

A. No, sir; I would say we would not.

Q. Why not?

A. Well, I think it would—well, it would clutter up the movement of our material at the mill; we wouldn't get consideration that we wanted to do it, and I don't see that we have changed today.

Q. You just do not consider it good business?

A. That's right.

Q. You told Mr. Leisure that up until 1922 your
28676 company sold on the basis of a mill price plus sacks plus freight.

A. Yes, sir.

Q. Did you experience any difficulty during—that is, up until that time, and during the time of that method of sale, in meeting competition—that is, the impact of competition, wherever you found it?

A. No, sir; because, really, we met the competition at the destination, because we—if we lost in freight, we lowered our base; the result was the same, except we did it from the other end.

Q. It wasn't a matter of your figuring on a destination price basis, in the meeting of any competition, then?

A. It really was, because the prices which we found in the field were such and such a price, and then we had to make up our mind whether we wanted to take less at the mill in order to meet that price, with our freight rate.

Trial Examiner Norwood: But you really could sell f.o.b. mill at varying mill prices, that would have the effect of meeting any delivered price, couldn't you?

The Witness: Yes, you could do that; yes, sir; we did for years.

By Mr. MacIntyre:

Q. Do you find it necessary to know the destination or the point of use of the cement in order to do that?

28677 A. Yes, you would have to do that because there would be no other way you could meet the competition.

Q. If that is so, then, Mr. Elliott, how are you able to meet competition in the sale of cement to railroads f.o.b. their tracks at your mill without knowing at what point on their lines it is to be used?

A. Well, if we deliver it at their tracks, and they move, we have nothing to do with the freight rate. That's a fixed—

Q. If you sell to anyone else, and they took the cement away in their own vehicle, or their own railroad cars, or cars of the railroad hired by them, it would be the same thing, wouldn't it? You wouldn't have anything further to do with it in those instances, would you?

A. I take it for granted the railroad would still, under the I.C.C., have to have some flat rate, or federal rate, rather, that would necessitate a charge from the point where they picked it up and delivered it, and if that was higher than some other competitor at the given point of usage, I rather think we would have to consider that if we wanted to compete for the business.

Q. Well, it costs the railroad something to haul it on its own lines, doesn't it? They pay for labor, pay for coal, and other things, so they take that into consideration in determining who is low as to their total cost laid down at the point of use, don't they?

A. I should imagine they would, yes.

28678 Q. And yet you give them f.o.b. mill price on

their rails at your mill without considering that as a competitive factor, don't you?

A. We would not give them a price at our mill because we are only on one railroad.

Q. Well, that is the Lehigh Valley?

A. Yes, sir.

Q. So you do give them an f.o.b. price at your mill?

A. Yes, sir.

Q. That is on the rails at your mill?

A. Yes, sir.

Q. Irrespective of where they are to use it?

A. Yes, sir.

Q. And without taking into consideration the cost factor of your carrying it to the point of use?

A. Well, we would load it in their cars and they would pull it out in that one case, right at our mill. That would not be the case with any other railroad, but they usually—they have asked for a destination price, the Lehigh Valley Railroad. We haven't sold them any for several years.

Trial Examiner Norwood: How do you meet your competition in selling to the railroads?

The Witness: Selling destination point f.o.b. their tracks whatever they might buy from our mill.

By Mr. MacIntyre:

28679 Q. Do you find out the competitor's price at that same point?

A. Yes, you will find quotations—we have quotations from various roads that accept bids of different kinds.

Q. Railroads are able to get several different prices when they have tracks at several different mills, aren't they?

A. I should imagine so, although in the case of our company I do not believe that we have ever sold very much cement directly to the railroad. In the Pennsylvania Railroad case, and the Reading Railroad case their cement is usually bought by contractors, to whom the work is sublet or let.

Q. You do not see any inconsistency in your willingness to sell the railroads f.o.b. their tracks at your mill and refusing to sell the U. S. Government and other customers on the same basis?

A. No, I do not.

Q. You do not see any inconsistency there?

A. No.

Trial Examiner Norwood: There is no question of the railroad re-selling it, is there?

The Witness: No, sir; there is none, and they usually use it for specific work and it is from their own tested bins in a great many cases, so they would have no reason to divert it or misuse it.

By Mr. MacIntyre:

Q. You told Mr. Leisure that since 1933 you had
28680 been using the freight rate books of The Cement Institute.

A. Yes, sir; that is true.

Q. In figuring the prices.

A. Yes, sir.

Q. What other information or factors do you use in connection with those books in figuring destination prices?

A. We have tariffs.

Q. Well, I am talking about price factors now, that is, the freight rates, and what else do you put together in arriving at a destination price quotation?

A. Well, we usually take the destination price that we have and figure it back, and then that is entered on a card and then we know if, for instance, we have to get into a point, into New England, it will figure back to such point at our mill, or we figure back to such and such a point at another point.

Q. That is, you take this figure at the mill, or basing-point price, plus the freight rate book to figure the destination price then?

A. No, I would say we took our destination price and deducted our freight and deducted our sacks, and obtained our mill net. I would rather say that is the way we have done it. Well, we did that when we had these what we term an f.o.b. mill price.

Trial Examiner Norwood: Now, figuring the price
28681 on the book or on the card, isn't it?

The Witness: Yes.

Trial Examiner Norwood: Now, what do you do to another destination in the same field with the price on the card?

The Witness: Well, then, we have—we change that, we change our price.

Trial Examiner Norwood: That is on the card, and add your freight to some other destination where you haven't quoted?

The Witness: No, what we generally—unless we are at an adjacent point we possibly have a destination price there that we had picked up. We are quoting most of these points, so that Your Honor will understand, we do not often quote for any business; as many years as we have been in the territory in which we ship it is not very often that we get an entirely strange point to quote.

Trial Examiner Norwood: Well, I was asking you what you do if you get it,—when you do have a strange point.

The Witness: Well, if it is close we figure about what the price will be and we quote that price. If it is wrong, and it is a friendly dealer, we certainly won't be long in hearing about it. If it is a dealer we do not know very well, why, we do not get the business.

Trial Examiner Norwood: Well, you haven't an-
28682 swered my question yet.

Go ahead.

By Mr. MacIntyre:

Q. Well, now, in the figuring of these prices, the use of the freight rate books of The Cement Institute, in figuring the prices as you have told Mr. Leisure, what factor do you add to that freight to arrive at the destination price quotation; that is the information I want. You told him that you used them as a part of your price information in arriving at destination price.

Now, let's find out what you use in addition to the book in arriving at the destination price.

A. Well, we use a tariff to check against that, but if you can follow me I will try to explain it. Suppose we pick up a price of $2.50, and we figure that back, so it was a 50-cent freight, say if was in cloth, and 40 cents sacks, we would deduct 90 cents from that, and that would be our mill net. Now, suppose we had to figure another price three or four days later. We could very easily check, basing it, we will say, $1.90 or $1.60 at the mill, add 40 and add 50, and you will arrive at the figure.

Q. In other words, you use this figuring point price?

A. Yes, sir.

Q. Plus the information from the freight rate book?

A. That is right.

28683 Q. Plus the sacks, in arriving at that price?

A. That is right; yes, sir.

Q. I believe you said that you also had the tariffs with

which and against which you check the rates from The Cement Institute freight rate books?

A. Yes, sir.

Q. Do you mean the official tariffs of the railroads involved?

A. Yes, sir.

Q. Do you keep those on file in your office?

A. Yes, sir.

Q. In both the sales office and the shipping office?

A. Well, I imagine the shipping office, we get in all those things direct from the agent at Cementon or Coplay, but they are on file in our office.

Q. That is in the sales office, as well?

A. Yes, sir.

Q. Do you check all rates against those?

A. I would not say we check all rates. At some times the rates are checked, but the clerks handling those orders are really with them every day, and they would almost know if a rate looked out of line, and then they would check it, but ordinarily they would just take the figure and after the quotation is sent out, if it is wrong, as I said before, if it is the dealer who wants to give us the business, or
28684 usually does give us the business, he will call us up and say he won't give it to us on that basis.

Q. Well, will the clerks that handles these tariffs and the freight rate books, are qualified to handle both, are they?

A. Yes, I would say they are.

Q. That is, they can readily ascertain the rates in either?

A. Yes, sir.

Q. With respect to your shipping, that is the freight rates used on your invoices, bills-of-lading, when you make a shipment, where do you get that, from the tariffs?

A. Yes, sir.

Q. That is, the official tariffs of the railways?

A. Yes, sir.

Q. Do you know how much the freight rate books of The Cement Institute cost you annually?

A. They used to cost us—I do not know right now—but them used to cost us in the neighborhood of fifty or sixty dollars a month. We used to buy what we wanted.

Q. Well, I am talking now on the basis of the mill rate per barrel.

A. No, I do not, because that is included in the dues.

Q. Well, it is a special dues, it is not part of the general dues I am talking about, one dues applies to the freight rate books. Do you recall offhand what that is?

A. No, sir; I do not.

28685 Q. It runs you something like $3,000 a year, doesn't it?

A. Oh, no. I do not have the information.

Q. So many mills per barrel?

What is your production?

A. Well, it will run from about one million four to one million seven, but it does not cost us anything like that, I am positive.

Q. How much do you pay as the highest salary to any one in your shipping department, now?

28686 Q. What is the most you pay any one of your traffic men, Mr. Elliott, on an annual salary?

A. I would say around $3,500.

Q. Around $3,500?

A. Yes, sir.

Trial Examiner Norwood: How many do you have?

The Witness: One.

Trial Examiner Norwood: Well, without those books, how many would you have? Have you any idea?

The witness: Oh, I would say we would have to have three because one would have to check the other. I am just—I can't answer that as a fact because we have never had it, but that would be my thought.

By Mr. MacIntyre:

Q. Well, why would you have to have three if you did not have the books, since you check all rates against the official tariffs anyway?

28687 A. Well, we do not check all rates at every time. We assume that the book is correct. If there is anything that looks out of line that would be checked, but we take for granted that the figure mentioned in the book is right, and that would show up if it were wrong.

Q. Well, now, as to these exhibits that Mr. Leisure called your attention to, 2759, 2756, invoices of the Whitehall Company which were submitted to the Federal Trade Commission under subpoena duces tecum last January 24—

A. Yes, sir.

Q. —those freight rates shown on there, taken by your traffic department from The Cement Institute books, or taken from the official tariffs, which?

A. I would say in some cases, both, both ways; in some cases from the books, to check—they check against the official tariff. Now, whether each individual case was checked, that I cannot say.

Q. And you cannot say how much difficult, if any more it is, to take the rate out of the tariff once it is checked than it would be to take it from some other place and then check it against the tariff?

A. Well, I have not handled tariffs, myself, for about pretty close to 30 years, but I would say it is quicker and easier to check from the book.

Q. How many traffic men did you have before
28688 1933, when you did not have The Cement Institute freight rate books, Mr. Elliott? That is, I am talking about rate men, I am not talking about people in the traffic department.

Mr. Seeley: I object to that as contrary to fact. The witness did not testify he did not have freight rate books prior to 1933.

Mr. MacIntyre: I beg to differ. He testified he did not receive them prior to joining the Institute.

Mr. Seeley: The record shows he always had freight rate books.

Trial Examiner Norwood: What did you testify? Do you remember?

The Witness: I testified that we bought them before we joined the Institute.

Trial Examiner Norwood: Well, do you recall the size of your traffic department before you used the freight rate books of the Institute, the Institute books?

The Witness: Well, we did get the books, we bought the books from them as we needed them.

Trial Examiner Norwood: You did not have any traffic department prior to that?

The Witness: Yes, we did have a traffic department, the same as now.

Trial Examiner Norwood: How many people did it have in it?

28689 The Witness: One.

By Mr. MacIntyre:

Q. There was a period between the National Freight Rate Bureau Traffic Bureau and the time The Cement Institute began to publish its own book during 1929 and the early part of 1930; do you recall whether or not you made any change in your traffic department during that period of time, increased the number of people?

Mr. Leisure: Now, if that question means there was a period of time between the National Bureau service and the Institute Bureau service in which he did not have any Bureau service, it is contrary to the record. It says there was a period of time.

May we have the first part of the question read again?

Mr. MacIntyre: That is my understanding. This witness can tell me if I am wrong in that understanding of the fact.

Trial Examiner Norwood: Read it.

(Question read.)

Trial Examiner Norwood: If there was any such.

The Witness: If there was any such we did not 28690 increase the people.

Trial Examiner Norwood: Well, do you remember if there was any such period?

The Witness: No, I do not offhand; no, sir.

By Mr. MacIntyre:

Q. What about the period previous to the National Bureau, when you were not buying their book?

A. I think we bought from the Nazareth Bureau.

Q. But you do not know previous to the Nazareth Bureau what you did?

A. No, I think that would go back beyond my time with the Whitehall Company, Mr. MacIntyre.

Q. Well, let's ask you one or two details as to your billing, Mr. Elliott:

When you attempt to make out your invoice and your bill-of-lading, what freight rate do you put on those? Is it one that, if I understood you to say, came from the official railroad tariff, or was checked by or with the official railroad tariffs?

A. It is checked by and with the official railroad tariff, and also stamped by the agent at Coplay, and in some cases our cars are weighed on our own scales which are checked

by the—except if it is a bulk car—that would be weighed at the railroad station at Coplay, or, rather, the railroad agent would give us the weight.

28691 Q. Now, copies of those invoices which carry such rates are sent to your sales office, aren't they—that is, your duplicate copy of that invoice, that is in your general offices at Philadelphia?

A. We get a shipping sheet and we would bill from that.

Q. Yes. When that arrives at your sales office in Philadelphia, they carry that freight rate that was put on there at the time of shipment?

A. Yes.

Q. How much more difficult, if any, would it be, Mr. Elliott, to copy from that invoice in your sales office the freight rate out to your customers' cards than it is to copy it from the freight rate book of The Cement Institute?

A. Well, I do not think—we do not carry the freight rates shown on the card beyond the fact that we would show it as so much. It would not be any more difficult; answering your question, it would be just making the figure from one thing as against making it from another.

Q. Wouldn't you be more sure, then, that you gave such actual rates as are used by you on your shipments to your salesmen for them to figure in quoting their delivered prices than would be the case if they were taken from some freight rate book of The Cement Institute?

A. I do not think so, Mr. MacIntyre. We have never run into any errors.

28692 Q. They are actually used in transactions by you, aren't they, and they are correct—I mean, as a basis for correct statement between the railroad company and your customers?

A. Yes, but there isn't any difference between them. They are both the same.

Q. But you prefer to use the book?

A. It is much easier answering the telephone in daily work.

Q. Since you have all those rates in the different forms, why would it take three traffic men to replace The Cement Institute freight rate books as you claim? What would they do?

A. Well, I am answering that, if we had no book at all

it would be a case of every time a quotation was asked on the telephone, it would be necessary—we would have three checks. We usually check a freight rate back, if new books come in they are checked. Now, if we had no books at all and just our list, there is a constant changing of tariffs. That would mean it would take a longer period of time to give a man a price, I would say under that condition, than it does using the book.

Trial Examiner Norwood: Couldn't you put that information on the card index as you look it up and then have it for reference?

The Witness: Not very well, Your Honor, because of the changes. You could do it but I do not know
28693 that it would be as helpful.

By Mr. MacIntyre:

Q. Why wouldn't it be as helpful, Mr. Ellioft, if it was put on your customers' cards as is the information in the freight rate book? It is the actual rate that is used by you, so just why isn't it as helpful?

A. It would not be as quick nor as helpful to the average clerk who answers the phone. They would have to go back to the traffic man to check them. I do not think they would have the confidence in themselves that they have in the book.

Q. Isn't it a fact, Mr. Elliott, that when you say you use that freight rate book for the freight in quoting, that you have a thought that with your competitors using the same book in quoting their prices, and the same base figures, that the prices are going to be the same as quoted by you, and your competitors for a particular destination?

A. No, sir, Mr. MacIntyre.

Q. You do not believe even that would be the case?

A. No, sir.

Q. You have no thought that would be the case?

A. We do not think about that.

Q. Well, isn't it your experience that since they are used in that manner that the prices quoted by you and your competitors are the same at a particular destination?

A. It could be, but if there is a price—

28694 Q. Well, isn't it a fact?

A. Yes.

Q. You do not intend to make them any different from your competitors at any particular destination, do you?

A. Well, if we made them different we would either get all the business or knock our prices down.

Q. Well, I am asking for an answer there as to whether or not you intend to make them different.

A. Do we intend to make them different?

Q. Yes, do you intend to make them different.

A. No, we except and hope to meet the lowest of competition, that is our ideas.

Q. You do not intend to make them different.

With respect to the 40-cent charge for bags, cloth bags, that you told Mr. Leisure is made in making up the price that you quote, haven't you found that the cost of the cloth bags used have fluctuated at times so as to be far below the 40 cents that is charged for them?

A. Not in the last 20 or 25 years, not since the war.

Q. Is it above the 40 cents?

A. Yes, sir.

Q. And yet you haven't changed the charge for them, have you?

A. No, sir.

Q. You kept them at 40?

28695 A. Yes, sir.

Q. Why haven't you gone along with the change in the cost of them?

A. Well, I think that the best answer is we handle at the present time very little cement in cloth. That is not a great factor in our shipments; most of our shipments are in paper, and we have some bags at the mill that we replace from time to time, and you never know if you raise your price—if the cotton market should drop it might go down, it would be a tremendous amount of bookkeeping. I think if you attempted to follow the price of sacks up and down, they have risen as high as 25 cents per bag.

Q. It would make it rather difficult to keep track of prices at destination points, too, wouldn't it, if you made changes up and down and charges for cloth bags?

A. No, I think you would figure that in your cost; it would be a bookkeeping item, if you pay more for your bags and added some to your cost it would be an item of cost, as I see it.

Q. I am talking about now as an item of price.

A. Well, it would make a difference in your price if you went up every time you bought a carload.

Q. A rather fluctuating price instead of an inflexible one, wouldn't it be?

A. Yes, sir.

Q. And reacting according to price of bags from time to time?

28696 A. Yes, sir.

Q. Where was the last date—I mean, the date in the last change in the price of bags that you know of?

A. We just bought some bags—

Q. I am talking about your price for them.

A. Oh, in our service charge?

Q. Yes.

28697 A. I would say since 1921 or 1922 it has been 10 cents a barrel, or 10 cents a bag.

By Mr. MacIntyre:

Q. Forty cents a barrel?

A. Yes, sir.

Q. And you know of no change in that price that has been made by you or your competitors since that date?

A. No, I do not think there has been one.

Q. Mr. Elliott, I believe you stated that you entered the cement business in 1901.

A. Yes, sir.

Q. With Lesley & Trinkel?

A. Lesley & Trinkel Company.

Q. In Philadelphia?

A. Yes, sir.

Q. These were two men that ran that company?

A. It was a firm, yes, just two men, John W. Trinkel and R. W. Lesley.

Q. That was Robert W., wasn't it?

A. Robert W. Lesley; yes, sir.

Q. Wasn't he an official of a cement manufacturing company?

A. Yes, sir: of the American Cement Company.

Q. Which is now part of the North American Ce-

28698 ment Corporation; isn't it?

A. Oh, no, it is the Giant.

Q. Part of the Giant Company, the Giant Portland Cement Company?

A. That is right.

Q. One of the Respondents here.

Q. Did you continue to work for Mr. Lesley until 1912, I believe you stated?

A. I think it was 1911, or the very beginning of 1912.

Q. And you were with the Alpha Portland Cement Company from 1912 to 1916?

A. That is right; yes, sir.

Q. And with Edison from 1916 to 1918?

A. That is right.

Q. At the time that you were with the Alpha was Mr. J. J. Mathes with the comapny?

A. He was treasurer, I think.

Q. Treasurer of the company?

28699 A. Yes, sir.

Q. What about Mr. T. M. Dyer?

A. I think he was in the Buffalo office.

Q. The sales office?

A. The sales office. I do not know whether he was a salesman or sales manager.

Q. What was your position with the Alpha?

A. Salesman.

Q. As a salesman?

A. Yes, sir.

Q. At the time that you were with the Edison, 1916 to 1918, what was your position?

A. Salesman for about a year and some months, and district manager for about four months, I would say.

Q. Associated with you in the sales department of the Edison were Mr. W. E. Horne?

A. Yes, sir.

Q. What was his position?

A. Well, he was sort of assistant to the president of the company, and I think he was also treasurer.

Q. Mr. Harold M. Scott, what was his position?

A. He followed later. He was assistant to the president.

Q. And what was the position of Mr. E. H. Phillips?

A. I do not know him.

Q. Don't you recall him as one of your associates

28700 with the Edison Company's sales office?

A. No, sir; I do not.

Q. What about Mr. J. C. Larue?

A. I do not know him.

Q. Mr. W. S. Mallory?

A. He was president.

Q. President of the company at that time?

A. Yes, sir.

Q. Between 1913 and 1922, 1924, I do not believe you gave us in what capacity you served the Whitehall Company?

A. Manager of sales. I went with the Whitehall Company as manager of sales.

Q. 1918, and continued as such until 1924?

A. Yes, sir.

Q. Mr. Elliott, what use do you make of the statistics, production and shipment statistics, of the individual competitors—that is, your individual competitors—given to you by Mr. Malloy of The Cement Institute?

A. We really do not make any special use. They are interested in knowing how the other mills are going, whether business is good or whether bad. We get the same information from the Bureau of Mines, and have for years.

Q. That is, showing individual companies?

A. Oh, no, no, no, just the general business.

Q. Well, of what value to you and to what use do
28701 you put it; that is, this information as to particular individual competitors?

A. Well, we do not put it to any particular use. The value is that it gives us an idea of the mills nearest, how they are running, whether they are busy or whether they are flat.

A. Are you enabled to keep abreast of them in your production and shipments?

A. Well, we produce as much as we possibly can. We sell as much as we can, but, of course, we know if the other fellow is not doing much, then we have to watch our storage to see that we do not get too much and can't operate over the winter.

Q. Is there any other use to which you put those statistics from Mr. Mallory; that is, as to individual companies?

A. No, sir.

Q. Are they of any value to you that you can think of?

A. No, sir; I would say not.

Q. Do you have any understanding with the Bureau of Mines when you send them your statistics that they shall not disclose your production in shipments of your company as an individual to anyone—that is, your competitors, or anyone else?

A. The figures were supposed to be kept confidential.
Q. Do you submit them with the same thought to Mr. Mallory?
A. Yes, I would say that we did.
Q. But you do know that he distributes them?
28702 A. Yes.
Q. To your competitors with key numbers that are known to your competitors?
A. Yes.
Q. And yet you continue to give them to him?
A. Well, it is a part of the Institute. When we were not members of the Institute we did not give them to him.
Q. But you have all the time since you have been a member of the Institute?
A. Yes, sir.
Q. Well, why are you willing for Mr. Mallory to disclose to your competitors such details of your business when you are not willing for the U. S. Department of Commerce Bureau of Mines to disclose it?
A. I do not believe we ever gave any thought to it. They asked for the figures and they were figures that could be obtained, and it could easily be found, I suppose, even from the Bureau of Mines' figures by a matter of elimination.

By Mr. MacIntyre:

Q. If you did not know it was your own could you from the Bureau of Mines determine figures for all of the companies?
28703 A. No, but I would come pretty close to how they were operating in the district in which we were operating, and it would not mean much to us, which company was operating more than the other.
Q. I believe you told Mr. Leisure that one of the reasons or the reason you joined The Cement Institute was because of it being selected by the industry to represent the industry under the Code; is that correct?
A. That is right; yes, sir.
Q. Are you continuing your membership in it for the same reason?
A. No. We continued it after the Code because, as I think I mentioned once before, there was quite a little talk of the N.R.A. coming back in some different form, and you would still have to have some association to represent you.

Q. You are a member today, though, aren't you?
A. Well, we can't get out today very well.
Q. You got into something you can't get out of?
A. (No response.)
Mr. MacIntyre: That is all.
Mr. Elliott: Thank you, sir.

28704 GEORGE E. WARREN was thereupon called as a witness for the Respondents, and, having been previously sworn, testified as follows:

Direct Examination by Mr. Withrow.

28705 I am connected with Southwestern and my present position is vice-president and manager of the Osborn plant at Osborn, Ohio. I have been connected with Southwestern since March 1933. Prior to that time, my experience in the cement industry was that I had worked for the Portland Cement Association for about twelve years, from 1921 to 1933, and for the Universal Cement Company in Chicago from 1915 to 1920. I was technician with the Universal Company in the inspection and promotion bu-
28706 reaus. I was assistant general manager with the Portland Cement Association. I had considered taking a job with Southwestern for about three years, that is since 1930, before I became connected with the company. I was promised promotion with the Association at the time and finally took a job with Southwestern in March 1933. Mr. Merrill and Mr. Powell both urged me to take the Osborn job and told me they were in need of a competent sales executive there and wanted me to go there in that capacity. They started to urge me in 1930.

28707 The mills of Southwestern are located at Victorville, Calif.: El Paso, Texas and Osborn, Ohio. I know when each of these mills was acquired: El Paso in 1909; Victorville in 1915 and Osborn in 1924. South-
28708 western did not buy these mills but built all three of them. It built its mill at Osborn, Ohio on account of good availability to raw material and good prospective market.

28717 Mr. Withrow: Well, I offer to show through this witness, Your Honor, that the officers of the Southwestern Company are as follows—

Trial Examiner Norwood: Wait a moment. Let us not read that into the record. You offer to show who the officers of the Southwestern Company are; is that right?

Mr. Withrow: Now, I offer to show the precise persons, because the only way, as I understand the law, that an offer of proof can be made, for it to be effective, is to be definite, and the only way I can be definite is by naming the officers, and I ask leave to offer to recite the officers at this time.

Mr. Paulson: Your Honor hasn't ruled it out of
28718 the proceedings. He advised Counsel he could put it in at the proper time. There is no calling for an offer of proof at this time, and I object to it, and it takes up the time of the hearing needlessly.

Trial Examiner Norwood: I shall sustain the objection.

Mr. Withrow: Does Your Honor specifically instruct me not to complete my offer of proof?

Trial Examiner Norwood: You can complete your offer of proof—.

Mr. Withrow: I mean to recite at this time—

Trial Examiner Norwood: But you need not use the time to read a statement and take up time for a matter of considerable extent.

Mr. Withrow: This is not for the purpose of taking up time. I think that in order to complete the proof I should read the names, and, if I understand Your Honor's ruling, then I want to note an exception on the record.

Trial Examiner Norwood: Yes, I rule you should not take the time to read those out.

28719 I am in charge of sales at the Osborn plant. The plant has a yearly operating capacity of nearly 2 million barrels.

28722 By Mr. Withrow:

Q. Did you ever agree not to produce more than 1,571,000 barrels of clinker per year?

A. No.

Q. Did you ever have any agreements about the amount of cement or clinker that you would produce?

A. No, sir.

28726 Southwestern's three mills have a capacity of about 5,500,000 barrels of cement. Southwestern is neither a parent nor a subsidiary of any other cement producing company.

28735 Q. Now, would you describe in a general way the territory in which the Osborn mill markets cement?

A. A large part of Ohio, nearly all of Indiana, about half of Kentucky, and nearby points in Pennsylvania, West Virginia, and Illinois.

Q. How much of your cement is consumed in Ohio, Mr. Warren?

A. I would say about two-thirds.

Q. And what is your biggest single market area?

A. It would be the Miami Valley neighborhood surrounding our plant or I would say between Cincinnati, on the south, Piqua, Ohio, on the north.

Q. And what large towns—what towns do you find in that area?

A. Cincinnati, Middletown, Hamilton, Dayton, Springfield, Piqua.

Q. And what is the character of this Miami Valley area?

28736 The Witness: Agricultural and industrial communities.

By Mr. Withrow:

Q. Mr. Warren, do you ever sell below the operating cost of manufacturing in this marketing area which you have just described?

A. No, sir.

Q. Do you know what variations in mill net are that you receive at your Osborn plant, say, in the year 1937-1938?

A. Approximately; yes, sir.

Q. What are they?

A. They vary from about $1.20 to about $1.65, or $1.70.

28737 Q. Now, where do you receive this maximum net of $1.65 that you have referred to?

A. At Dayton, Springfield.

Q. Is $1.20 a satisfactory net to you?

A. Well, it would not be for all of our products, no.

Q. Well, why do you take $1.20, then?

Mr. Paulson: I object—just a minute.

28738 By Mr. Withrow:

Q. Well, why don't you withdraw from this marketing area with a mill net as low as $1.20?

A. Well, the demand is quite a variable thing, and the demand changes, and so do prices.

Q. How long do you try to maintain your own customers in some of these distant markets, even though you get a low net?

A. Did you say how long?

Q. Yes, for how long a period?

A. Well, we try to maintain them continuously if we can.

Q. Have you ever withdrawn from any market in which you actively solicited cement sales?

A. Yes, we have.

Q. What market?

28739 A. From Cleveland, and withdrawn principal solicitation from around Toledo.

Q. Well, what were the circumstances generally surrounding your withdrawal?

A. Well, we were unable to get enough business to maintain a salesman; it seemed to be wasteful to continue solicitation where we could not secure enough orders to back him up.

Q. Do you confine your shipments from the Osborn mill to certain defined territorial limits?

A. No, we do not. I generally describe the area without giving exact boundary limits.

Q. What determines the extent of the territory in which you make sales from the Osborn mill?

A. Did you say who, or what? What determines?

Q. What determines.

A. Well, our ability to get business at what would seem to be a reasonable figure, and our ability to serve the customers and the willingness of customers to patronize us.

Q. Well, would the amount of available business in that market have anything to do with it?

A. Oh, yes, decidedly.

Q. In a few of your answers you use the term "mill net." Exactly what do you mean by the term "mill net"?

A. "Mill net" is the—as I refer to it—is the gross amount that we receive, recover from a sale after de-

ducting the freight charges and package and dis-

28740 count allowance, package allowance.

Q. Do you consider this mill net to be your price?

A. No. It is the mill net. It is the mill recovery.

Q. Now, in an answer a few moments ago you referred to one reason you went into a territory, the long-term relations you had had with a customer. What do you mean by this "long-term relationship"?

A. Well, I think that would apply particularly to a contractor with whom we had been more of less regularly doing business, and there are sometimes when he gets a little further from home, why, we follow him and sell him if we can, retain his patronage and our contacts with him.

Q. And why do you follow him?

A. Well, even though that might not be as attractive as some business he has had before, he will move again and we do not want to lose him out of our contact and into the hands of someone else.

28742 Q. Do you have any minimum mill net below which you will not quote?

A. I do not believe I have ever thought of it in that light; no, sir.

Q Well, does the lo st mill net to which you would go vary from time to time?

A. Yes.

Q. And who decides in any case what the minimum will be?

A. I do.

Q. Now is this figure of $1.20 which you mention as your minimum for the year 1938 at Osborn, is that a fixed minimum mill net?

A. No, it is not. That would depend on circumstances.

Q. Do you ever sell in territories where you receive what you consider an unduly low mill net?

A. Well, that seems pretty low, that seems pretty low to me, yes. I would like to get more, but the circumstances determine your views on a matter of that kind, the need for securing business will sometimes—you are sometimes desperate to secure orders, and you will be influenced by your views on the subject in each case.

Q. Under what circumstances do you remain in the market where you receive a low mill net?

28743 Trial Examiner Norwood: Well, now, I think we have covered that, and I will state for the examining Counsel's benefit, while he was absent we have gone into that question so much that all the reasons have been given with respect to various companies, and I think

that the minds have all met on the matter of not going into those details any further here; every one is familiar with all those considerations about making concessions to get more business, and making concessions in times of depression to keep the factory open, all that was gone into, so that there is no use bringing that out again with respect to this witness unless this man had an experience that is different from the others and you can show those differences, add to it in any way.

Mr. Withrow: Your Honor, I was going to go into this in some detail, but if you will let the witness
28744 answer this one question, why, I will not go into the subject any further.

Trial Examiner Norwood: Well, I think you might answer.

A. Owing to the difficulty of establishing a brand and getting the customers to use it in a market, it is with great reluctance that you drop out of that market knowing that to get back in you will have to go through the difficulties and expensive procedure, solicitation, and effort, and may not be able to return it; a market once secured is not willingly given up.

28745 New York, N. Y.;
December 13, 1939.

28746 GEORGE E. WARREN thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Withrow.

Q. Mr. Warren, is the territory in which the Osborn mill is located affected by any seasonal or other variations in demand?

A. Seasonal decidedly.

Q. And to what do you ascribe this seasonal variation and demand?

A. There are generally enough good days in the year for people to do their concrete work, and in winter and bad weather there is very little done.

Q. Is there any other factor which would affect
28747 the demand for cement from month to month?

A. Well, from month to month and year to year the demand varies, of course, with construction activity. A municipality may be very active in one year and do little or nothing in the next.

Q. Have you attempted to do anything to level out those fluctuations in so far as they affect your company?

A. Oh, yes, we strive to get people to continue concrete work in cold weather, give them information on how to do it, but we still have, of course, wide fluctuations in seasonal delivery.

Q. Has this fluctuation in demand in any way affected the amount of storage capacity which you have to have on hand?

A. Yes. We have very large storage capacity because we attempt to operate through the winter months. We store up for—

Trial Examiner Norwood: Now, we are going over subjects that we have been over so many times, and it seems to me that it has been shown generally these conditions apply to all cement mills, and if there is anything different or peculiar with this situation here you might bring that out, and if the Counsel insists on going over this same subject with him I will ask the witness to make short direct answers to the questions and do not launch into explanations that take time.

28748 Mr. Withrow: Your Honor, no witness from the Southwestern Portland Cement Company has dealt with this matter.

Trial Examiner Norwood: That is true.

Mr. Withrow: And it so happens the different mills of the Southwestern Company are perhaps differently situated with reference to this problem than other mills in the industry and we would like to bring out both the facts about the Osborn mill in comparison with other mills in the country, and we have—we think since this is a conspiracy case we are entitled to go into it, but we will make it brief, as Your Honor requests.

Trial Examiner Norwood: I will say for Counsel, too, if he does think it necessary to cover those general matters he might incorporate them into one long leading question, and if it recites those general facts that have been shown here I shall permit it, unless a very, very good reason is shown to the contrary.

By Mr. Withrow:

Q. Well, do these fluctuations in demand affect your cost of doing business?

A. Yes, sir.

Q. Will you briefly tell us how it affects your cost?

28750 A. Well, winter-time operation is expensive as against summer-time operation, and an operating crew is made up of specialists, men trained particularly in the class of work required in a cement plant who are generally kept the year round, and the fluctuation in demand raises all the overhead and supervisory costs as well as the actual operating costs.

Q. Does this fluctuation in demand,—does it have any effect on the available capacity which your mill must have?

A. For storage, yes; our mill has very large storage capacity, finished product.

Q. Has this fluctuation in demand caused any shut-down periods at your plant?

A. Yes, we have shut down on several occasions in recent years.

Q. How many kilns do you have at Osborn?

A. Four.

Q. What is the economical operating rate for a plant?

Q. For this plant.

28751 A. Three kilns will be fine; two kilns will be fairly economical.

By Mr. Withrow:

Q. With your recent demands for cement, how long could you operate on a two-kiln basis?

A. Six or seven months out of a year, the last seven years.

Q. And you would have to shut down the rest?

A. The balance.

Q. Are these shut-down periods costly?

A. Very costly, and very trying to the community with shut-downs several months at a time.

Q. What do you mean "trying to the community"?

Q. Does it have an effect upon labor costs, these shut-down periods?

28752 A. Yes.

By Mr. Withrow:

Q. How?

A. Carrying an overhead man, and key men, and maintenance men, during a shut-down.

Q. Have you, at Osborn, done anything to correct or improve this situation?

A. Yes, we have altered our mill considerably to enable us to operate with one kiln at the mill. The result is we haven't shut down just recently.

Q. Was this an expensive alteration?

A. Yes.

Q. What has been the result of the alteration?

A. We have had practically full year-round employment for all of our crew.

28753 Q. Have you tried to extend your marketing territory because of this seasonal variation in demand?

A. No, we travel the same territory, reaching where we can in the good years, or the bad.

Q. Does the demand for cement shift within your territory from year to year?

A. Oh, decidedly.

Q. What causes these changes?

A. Location of highway work, bridge, and other heavy construction.

Q. What percentage of capacity did your mill operate in 1937?

A. About 35 to 40 percent.

Q. Did shipments run the same as production?

A. Shipments ran a little over that.

28754 Q. Have you ever run the Osborn mill at full capacity?

A. Yes, for a few years in the '20's.

Q. How does your present sales volume in 1938 or 1939 compare with the sales volume of, say, 1927?

A. About half.

Q. Has this drop in sales volume affected your selling costs?

A. Yes, sir.

Q. In what way?

A. It has increased them markedly.

Q. Would you say that your sales costs are high today?

A. Yes, they are.

Q. Why are they high?

A. Because we have about the same number of men; in fact, one or two more; traveling about the same area, dividing the expense over a smaller amount of business.

Q. Why have you added any new men if your sales are smaller in volume?

28759 A. To meet additional sales effort of competitive companies expressed in additional salesmen on the territories.

By Mr. Withrow:

Q. Have you found that any of your competitors have increased their sales forces?

A. Yes, sir; and cut down territories, in some cases.

Q. And has it been this factor which compelled you, in part, to meet their increased activity?

A. Yes.

Q. Do you ship any cement to Dayton, Ohio?

A. Yes, sir.

Q. How far is Dayton from Osborn?

A. Twelve miles.

Q. Is that a large consuming market for cement?

A. It is a city of about 200,000; not as compared to Cincinnati or Columbus.

Q. But it is one of the large markets that you serve?

A. It is one of the large markets that we serve, yes.

Q. Could you possibly dominate and control the sale of cement in Dayton?

A. I don't see how we could, no.

By Mr. Withrow:

28760 Q. Why couldn't you?

A. There is another mill, of course, at Osborn, to begin with, and ten or twelve or more other brands regularly sold there, and mills surrounding us in the almost immediate neighborhood.

Q. About how many different cement companies do you compete with in your whole market area?

A. Between thirty-five and forty.

Q. What large cement producers does this thirty-five or forty include?

A. Large companies?

28761 Q. Yes.

A. The Lehigh Company, Universal-Atlas, Medusa, and Alpha, the Lone Star, are the large companies; Huron.

Q. I think that is enough.

About how many competitors do you meet in any particular market?

A. Eighteen in Cincinnati; the State Highway Department of Ohio tests and uses 28 brands, I believe, last year.

Q. And I believe you said one of your competitors has a mill at Osborn?

A. At Osborn; yes, sir.

Q. What company is that?

A. Wabash.

Q. And does this mill have the same freight rates to all points as your mill has?

A. Yes, both Osborn.

Q. How many miles from your plant is the plant of the Wabash?

A. About a mile.

Q. Now, in the regular course of your business do you have any discussions with people located at this mill next door, the Wabash mill?

A. No.

Q. Do you have any occasion to discuss what a price should be, or how a sale should be made with these
28762 people at the Wabash mill?

A. No, I never have.

Q. Do you know anything from the Wabash Company?

A. Well, I am acquainted with their superintendent there, Mr. Palmer, and I know Mr. Jennings, the president of the company.

Q. Where is Mr. Jennings located?

A. Detroit is his office.

Q. Do you have any occasion to call him up to discuss matters affecting your Osborn mill and how to quote prices?

A. No, sir.

Q. In what capacity have you known Harry Jennings?

A. Well, I know him more recently; he was a trustee of The Cement Institute; but I have known him for many years through my activities with the Portland Cement Association.

Q. Is he any relation to the William J. Jennings that was connected with the Southwestern Company?

A. No.

Q. Mr. Warren, do you consider your company a price leader or a price follower?

A. Well, I would say we were a price follower.

Q. And how do you determine the price at which you will sell cement at any particular destination?

A. By the prevailing destination prices that we find in the territory.

28763 Q. How do you find out what these destination prices of your competitors are?

A. From our customers.

Q. And do they call in, or what is the fact?

A. Well, the salesmen will—our salesmen will call in every day, and dealers call in; we find through both sources, direct from our customer and through our salesmen from the customer.

Q. In other words, your salesmen obtain that information direct from the dealer; is that right?

A. Yes, during the time that they are calling and soliciting.

Q. Do you follow prices by checking the price at every destination in your territory?

A. No, I do not think we would ever check every destination.

Q. Do you think it is necessary to check every destination?

A. I do not think so. We haven't found it so.

Q. Well, what do you do in order to find the price at these other points in your territory?

A. Well, we assume something there. We check a number of points until we find what the pattern is, figure them back, freight rate to different cement mills, and if a number of them are there it is our belief that a general change in price has been made, and if we decide to follow it we assume that that has been change, and quote on that basis.

Q. Now, when you say you figure back a pattern to certain mills, what do you call these mills?

28764 A. A base price; a base mill.

Q. And what do you call the figure at a base mill?

A. Mill base price for that company owning that mill or for that mill.

Q. And you consider this mill base price a price?

A. No. We figure the mill price for that plant.

Q. And now just how do you determine what these price bases are in the amount of them?

A. By use of the destination price at a given point of use and subtraction of the freight rates to that mill.

Q. Now, is this price base, is that a mill price or is that merely a figure to be used in calculating prices?

A. Well, that is a mill price for that mill. It is a price that is shown in the field has been quoted by that company.

Q. Well, do you find that they make sales at that figure?

A. Yes.

Q. I mean sales at their mill at that figure, or is that the way?

A. Sales at the various destination points for which that is the mill base price for them.

Q. Do you ever receive price base information from your competitors?

A. No, I never have.

Q. Where do you get this price information?

28765 A. Well, by the process that I have described of finding destination prices in the field and reducing them by the freight rates to the given mill.

Q. Have you ever had occasion to check this information that you have gotten with the Engineering News Record?

A. Well, they publish—have published for a number of years—once a month prices of various materials, and they have included some of the cement base prices in a tabulation. I have seen that on a number of occasions.

Q. Well, do you watch their figures?

A. No, I do not pay much attention to them.

Q. Well, does anybody in your company watch them?

A. Our sales office makes a practice of recording them or of filing them as they come along.

Q. And why?

A. Well, I think it makes a convenient history on the price of cement throughout the country over a period of years. It is an easy way to collect such general information.

28769 Q. Would you tell us how you calculate your commercial price?

A. The calculation is—you mean other than those from which we have the actual quotations?

Well, if we find what we believe to be a base price at a given mill we add the freight rates from that mill, and from other mills where we believe there is a base price and use the lowest combination of base price plus freight to destination.

Q. Well, when you follow this routine, do you know in advance of quoting your price that it will be the same as any of your competitors?

A. Oh, no, no, no advance knowledge of it. It is our belief that we are meeting the lowest price at that point.

Q. Now, Mr. Warren, as a price follower, do you follow the highest price or the lowest price which you find in the market?

A. The lowest price.

Q. Now, why don't you go below the lowest price quoted by any of your competitors?

28770 A. Well, I have not felt that the price was quite high enough, and I have not been anxious to establish any lower prices.

Q. And if you did quote any lower prices do you think it would increase the volume of your business?

A. No, I do not see how it would.

Q. Why wouldn't it?

A. Well, our experience has been that people do not recede from places where they have been selling, and that the prices generally are followed by other companies selling the same product.

Q. In other words, your competitors would meet your new lower price?

A. Competitors, yes.

Q. Am I correct in understanding your testimony that if you reduce the price you would merely be getting the same volume of business at a lower price level?

A. Practically so, yes.

Q. How do you know that this would be the result?

28771 A. We have followed price reductions on numerous occasions, and have maintained our regular customers even though the lead in the price reduction had been taken by some other company.

28722 Q. Mr. Warren, you said that you followed these price reductions. Did you find that any other companies followed them when reductions were made?

A. I found that all of them did.

Q. I believe you stated that competitors meet new low prices immediately. What do you mean by "immediately"?

A. As soon as we learn of a price decline we notify our trade as quickly as we can. Now, that may be within a day or two; as soon as we are certain that there is a price decline.

Q. And do you find that in the event of a price decline

that if you are a day or two late in getting out the information that you lose a substantial volume of business to your competitors?

A. No, we do not find that. They are not arbitrary customers and they notify us that they have better prices, and we have a chance to act.

Trial Examiner Norwood: Don't they know that you would meet them? Haven't they been told that you
28773 would meet them?

The Witness: Well, I would not say so, sir, no.

By Mr. Withrow:

Q. Well, do they or do they not give you an opportunity to meet those lower prices?

A. They do, yes, but the answer to the Judge's question—I would be a little reluctant to make too general a commitment of that kind to the question.

Q. Well, why is it, Mr. Warren, that you meet a new low market price as soon as you find it is being quoted?

A. To return the customer that we have built up.

Q. Have you ever found that you could command a higher price for your brand of cement?—

A. No.

Q. —than your competitors?

A. No.

Q. Is that the reason for the speed with which you attempt to meet new low prices?

28774 A. Yes, it is.

Q. And from your experience at Osborn have you or have you not found that your competitors act with like speed in cases of price reductions?

A. Yes, and we find that they do. Quotations will follow quite rapidly.

Q. Now, have you ever found an instance where one company attempted to increase the price in your territory and was unsuccessful?

A. Yes, I recall one such incident.

Q. And when was that?

A. In the early part of 1933.

Q. And what company was that, you recall?

A. The Lone Star Company of Indiana; it was then called. We found quotations quoting higher prices in Indiana than localities in which we shipped, which we did not follow.

Q. And why didn't you follow them?

A. Well, I was a little bewildered at the time as to whether it was followed by others, and without—I was anxious to advance, but waited, and I did not find any or very many of the quotations, and shortly it was withdrawn and the former price re-quoted.

28775 Q. Mr. Warren, would you tell us whether or not The Cement Institute has ever attempted to persuade you to exercise price leadership, or to refrain from price leadership?

A. Oh, no, they have had no—no representation on that matter.

Q. Well, has any other cement company, or any cement company, ever attempted to influence you to either take price leadership or to refrain from price leadership?

A. No, they have not.

Q. Will you tell us whether or not you have ever had any understanding or agreement of any kind with any competitor with respect to the price of your cement?

A. I have not.

Q. Would you tell us whether or not The Cement Institute has ever had anything to do, in your knowl-

28776 edge, with the fixing of the price of cement?

A. Why, I know that it has not.

Q. In so far as you know, has the Cement Institute ever interfered in any way with competitive conditions?

A. No, they have not.

Q. Now, in carrying out your company's policy, would you tell us whether or not you have ever been dictated by anything else—anything other than the interests of the Southwestern Company?

A. No, sir; I have not.

Q. Do you have in your office a file of destination prices and points where you sell cement?

A. Yes,—and many places where we try to sell.

Mr. Withrow: Could I have this marked for identification?

Trial Examiner Norwood: It may be marked.

(The document referred to was marked for identification "Respondents' Exhibit 1641-A and 1641-B.")

By Mr. Withrow:

Q. Mr. Warren, I show you Respondents' Exhibits 1641-A and B, for identification, and ask you to tell us what it is—not its contents, but what it is?

A. It is a card from our files, showing a destination in Ohio, and containing the names of prospective customers at that point.

28777 Q. Is this the card to which you were referring just a moment ago?

A. Yes, sir.

Mr. Withrow: Your Honor, I offer Respondents' Exhibit 1641-A and B in evidence (handing document to Mr. MacIntyre).

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Warren, what are these names appearing across the top of the card in a vertical manner?

A. They are the names of locations of cement plants.

Q. Basing points?

A. No, not necessarily; some are and some are not; they are different cement plants through the territory.

For instance, there is Osborn—Osborn is not a basing point.

Q. Are there any on there that have never been basing points—or have not been?

Mr. Withrow: Your Honor, this is not proper voir dire examination. I object to it. I don't even think the question is material and relevant to any of the issues in this case.

28778 Trial Examiner Norwood: I think that before Counsel should be required to pass on it that he may find out what those abbreviations mean on that card.

Mr. Withrow: But the question of whether or not the mills there located have ever been basing points has nothing to do with the materiality or relevancy of this exhibit, and won't aid him in making any objections.

Trial Examiner Norwood: I think it has something to do with his understanding of what the card is.

The objection is overruled.

I will adopt those questions in my mind—these voir dire questions about the exhibit,—no matter who asks the questions.

A. I would say some.

By Mr. MacIntyre:

Q. Within recent years?

A. I think if you go back some time—Painesville and

Fultonham, I am uncertain—but at the present time I don't believe there is any basing point at either point, nor at Osborn.

Q. But at other points?

A. At other points—the list includes the different mills, whether they are or whether they are not in our immediate neighborhood.

Q. What are these figures that appear across the card just above the date line (referring to Respondents' 28779 Exhibit 1641)? What are the figures?

A. That's the freight rate.

Q. Freight rates from what point?

A. From these points to those points—or to that point (indicating exhibit).

Q. From the points under which they appear to Ashland, Ohio?

A. To Ashland, Ohio.

Q. From what source did you secure the information that made up the freight rates that appear on that card?

A. From our freight files.

Q. When you say your freight files, what do you mean by that?

Mr. Withrow: That is not proper.

Trial Examiner Norwood: I think Counsel has gone far enough.

Mr. MacIntyre: I am attempting to determine the source of the material that appears on the card, and we can determine from that whether or not the card is admissible in evidence; if it is incompetent or immaterial it would not be admissible in evidence, irrespective of the fact it appears on the card, so we are trying to get at the source of the material.

Mr. Withrow: Your Honor, if they guessed as to what those freight rates were, and put them on the card, and he says that's what he believes, that card would be material or relevant. The sources of those freight rates 28780 is proper cross-examination, Your Honor, but not voir dire.

Trial Examiner Norwood: I don't think that, strictly speaking, they are material and relevant, but we have been letting in a few of them, or a sample card here, to permit the Respondents to illustrate his method as to prices. It is improper to draw—

Mr. Paulson (Interposing): Both, again, absolutely

immaterial, because the witness has said he makes his prices by stating the base figures that he arrives at, and adding thereto freight rates.

Now, that is all that is material in this case. What he does in the way of office records is absolutely immaterial, and we just want to find out on voir dire, if that— If he wants to change his testimony on direct, and if there is any foundation for these exhibits at all. They are absolutely immaterial.

Trial Examiner Norwood: Does Counsel object to the card?

Mr. MacIntyre: Yes, we object to the card as being irrelevant, immaterial, on the basis of the testimony given by the witness.

Trial Examiner Norwood: Is that the only card that the Counsel wishes to offer there?

Mr. Withrow: Well, that's the only card to show the general method in which they file their prices.

28781 Trial Examiner Norwood: Well, it is admitted for that purpose, to illustrate his method of recording the prices.

The objection is overruled.

(RESP. EX. 1641-A and 1641-B was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Warren, would you describe how this Respondents' Exhibit 1641-A and B is used?

A. It is used in billing. That card contains the price that we have quoted to Ashland, Ohio, and in the event of a sale to Ashland, Ohio, that card would be consulted by the billing clerk to secure our price at Ashland.

28785 Q. Mr. Warren, do you consider the Southwestern Mills at Osborn a base or a non-base mill?

A. A non-base mill.

Q. Has that mill at Osborn ever been a base mill?

A. It has never since I have been there, but I understand it was at one time, a short time prior to that time.

28787 Q. Mr. Warren, why is not Osborn a basing point at the present time?

A. Well, I don't believe that the volume of business available justifies it. There are basing points thick around us, and I see no point to be served by a base there, where

the price would be higher than I would like to take for our cement. It would be an artificial gesture.

28789 Q. Have you ever considered putting in a base at Osborn?

A. By "considered," do you mean have I thought it over?

Q. Yes.

A. Yes, sir.

Q. What considerations motivated against putting in a base at Osborn?

A. Well, the fact that I did not think it would benefit us; we are trying to earn on our property.

Q. If you decided that you wanted to put in a base to make that become a basing-point mill, would you be free to make it a basing point?

A. Yes.

Q. How would you go about doing it? Making it a base?

A. Quoting prices to the trade based on a price at the mill, plus freight to destination from our mill, in the nearby areas.

Q. Could you do that at any time?

A. Well, I should correct an answer I made there. In doing it I would naturally want to consult other

28790 officers of our company, but I am free, so far as any outside influence is concerned, yes.

Q. Could you do that at any time?

A. Yes.

Q. Since you have been at the Osborn mill has the Southwestern Company ever instituted a price change at that mill?

A. We institute a price?—no sir.

Q. Then, the Osborn mill has been purely a price follower since 1933 to date?

A. Yes.

Q. And why?

A. Because I have not felt that prices were high enough. I would not care to take the lead with any lower prices.

Q. Mr. Warren, would you name for the record the figuring points or basing points which you find in the market area which surrounds you, your mill?

A. Yes, I think I can remember most of them. Ironton, Ohio, Universal, Pa., Cleveland, Bay Ridge, Cleveland,

Ohio, Buffington and Limedale, Mitchell, Ind., and Kosmosdale, Ky. I believe Warrenton, Pa.

Q. Well, isn't it a fact that Osborn is surrounded by basing points?

A. Yes. I have named eight or nine there that circle us.

Q. And about how far away are these basing points?

28791 A. The nearest about a hundred miles; and the others are between that and I would say 150 miles, a little over that in the case of Buffington and Pittsburgh.

Q. Do you find that your Osborn mill loses any advantage of location by employing a basing-point method of figuring prices?

A. No.

Q. Do you make any cross-haul shipments, Mr. Warren?

A. What do you mean by "cross-haul"?

Q. Well, suppose you define the term in answering it.

Trial Examiner Norwood: Cross-shipments?

The Witness: Sir?

Trial Examiner Norwood: Cross-shipments.

Mr. Paulson: I do not see how the witness can both ask himself a question and answer it.

Mr. Withrow: Your Honor, it has been done a thousand times on direct.

Trial Examiner Norwood: I know, but the witness, himself, says he does not understand clearly what you mean. I think you will have to explain it.

By Mr. Withrow:

Q. I mean cross-shipments. By that I mean a shipment from your mill passes a shipment from another mill not on the same job but on a different job.

Mr. Paulson: If I understand that question, he
28792 said passed a shipment from another mill. That is not the way a cross-shipment—is not all-embracive anyway. I wonder if he meant to restrict the question.

Mr. Withrow: Your Honor, I do not mean passed another mill. I defined a cross-shipment as I intended it to be in the question, and I think Counsel for the Commission—I think I should be entitled to define the term as I want to define it.

Mr. Paulson: Absolutely, no objection to that at all. I just want to get it clear.

Mr. Withrow: Would you read the question and the definition?

Trial Examiner Norwood: I stand corrected.

(Record read.)

Trial Examiner Norwood: Do you understand that?

The Witness: Well, in a way, no. I do not know what other people are shipping or to what points they are shipping except incidentally. We do ship from our mill in all directions on the compass. Whether those shipments cross shipments of others would be—I would not have information on that, I would not know.

Trial Examiner Norwood: Well, do you ship beyond another mill to points beyond another mill?

The Witness: We do; yes, sir.

28793 Trial Examiner Norwood: Where the distance from the other mill to the point of delivery is just that much more than your mill to the competing mill?

The Witness: Well, the map does not always disclose that, but the distances to the point of shipment will vary from our mill longer than others, and vice versa.

By Mr. Withrow:

Q. Now, in these shipments that you were talking about with the Examiner, what reasons enter into individual cases of such shipments?

A. Well, now, you are speaking of physical or commercial there?

Q. Commercial.

Q. Why do you make such shipments?

A. To solicit as far as we can serve and get business in all directions from our mill in as many localities as possible.

28794 Q. Mr. Warren, are your sales expenses on large orders less per barrel than on small orders?

A. They might be. We do not segregate each sale. The man working is attempting to get sales, and he gets some. We do not segregate each sale made. It might be more; it might be less.

Q. Is it or is it not a fact that the servicing of orders has a great deal to do with the question of sales expense?

A. A great deal; yes, sir.

Q. Is this servicing of orders dependent in any way upon the size of the order in question?

A. We attempt to give as careful service as we can to each order, but frequently large jobs require a great deal more attention than routine shipments.

Q. In some cases would it be more profitable to ship a great distance at small sales expense than to ship a short distance under large sales expense?

A. Yes.

Q. And is it or is it not a fact that such shipments would appear to result in some of these shipments past a mill that you were talking to the Examiner about?

A. Yes, sir.

28795 Q. Could you give us some idea as to what the amount or extent of cross-shipments in your market area is?

Trial Examiner Norwood: Well, I think he might tell us what he understands by cross-shipments, and then he may answer the question.

The Witness: The question now is what do I un-
28796 derstand by "cross-shipments"?

Trial Examiner Norwood: Yes.

The Witness: Well, it is not a thing that I have calculated very much. I do not—we ship past the shipments of other mills; we know that, because we do not ship all the cement in our neighborhood and neither do we ship all in the neighborhood around or beyond other mills.

If I had to make a definition it would be that some cement going one way from one company and in the opposite direction from another, and they crossed in transit.

By Mr. Withrow:

Q. Now, would you answer—

Trial Examiner Norwood: Well, do you know the percentage of your business that covers the cross-shipments as you define them?

The Witness: No, I would have no way of knowing that. I can determine what we ship to any given points but not what any others ship.

28797 By Mr. Withrow:

28798 Q. Now, since you have been with the Southwestern Company have there been any changes in the number of bases in your area, or has it been fixed?

A. Changes in the number of bases?

Q. Number of bases.

A. Yes.

Q. Now, have bases been added or bases dropped?
A. New bases have been added.
Q. Do you recall any offhand?
A. I recall Bay Bridge, Ohio, and Wampum, Pa., as having been added.
28800 Q. Do you receive such lists of basing points
28801 from your competitors?
A. No.
Q. Well, do you issue these quotations which you talk about periodically?
A. We issue them generally in the event—we always issue them when there is a price change and occasionally we have issued them when there has been no price change.
28807 Q. I don't recall, Mr. Warren, whether you told us how often you sent out quotations like Respondents' Exhibits 1643-A and B and 1644-A and B.
A. Whenever we issue a change in price.
Q. Now, are there any occasions when you broadcast quotations, other than a change in price?
A. Occasional general broadcast is made; seldom in our case.
Q. Do you find that some of your competitors issue quotations more often than you do?
A. It is my impression they do; I think they do.
Q. Why don't you issue more periodic quotations, then?
A. Well, I have no objection to it, but it is an expense that I have not thought was necessary. We have been pressed pretty hard to hold down expenses. That's the only reason I have.
Q. Do you keep a copy of each quotation which you issue?
A. No.
Q. Well, how do you keep a record of what prices you have quoted?
A. We enter the price quoted to each customer on an office card, to save the necessity of keeping carbon copies of quotations.
Q. And by an office card, you are referring to a
28808 card like Respondents' Exhibit 1641-A and B (indicating)?
A. That is the card used, yes.
Q. To how many points do you send quotations?
A. Oh, several hundred, perhaps close to a thousand points.

Q. And to whom do you send the quotations?

A. To dealers.

Q. Do you send to all the dealers in the territory?

A. No, there are some, obviously, that we don't care to trade with, and some that we know don't care to trade with us, but we send them to a large list of those who are handling and regularly buying our cement, and those that we hope to sell.

Q. Just to speed this up—when you send out this quotation, you fill in the effective dates and the prices and the various items?

A. Yes.

Q. In this form (showing to witness Respondents' Exhibit 1644-A and B)?

A. Yes.

Q. And that is Respondents' Exhibit 1648-A and B and 1644-A and B?

A. Yes.

Q. Do these quotations which you issue relieve salesmen of the necessity of quoting prices?

A. To a large extent. Each dealer has on file our price, and if he wants to inquire, the salesman is able to tell him.

28809 Q. To whom do you send lists of price bases, or lists of basing points?

A. We do not send them to anybody.

Q. Have you ever sent lists of basing points to your customers?

A. No.

Q. Have you ever sent price bases or destination prices to your competitors?

A. No.

Q. Do you confine sending information about destination prices to your dealer trade, generally?

A. To our dealer trade?

28810 Q. Yes.

A. Yes, although contractors who are doing work which we sell direct are quoted direct; although we do not broadcast quotations to them.

By Mr. Withrow:

Q. Why don't you broadcast quotations to them?

A. Because generally we don't sell contractors direct. Most contractors buy through dealers, and we don't know what the dealer wants to charge him for a particular piece

of work, and the contractor, in figuring on such work which we do sell direct, we quote him for that specific work, if we are acquainted with what he is figuring.

It would be an extravagance to quote such a list, and would serve no purpose.

Q. Have you ever received prices of your competitors directly from them?

A. No, sir.

Q. Do you ever receive, or have you ever received, price bases from your competitors?

A. No, we have not.

28811 Q. In the event of a price change by one of your competitors, how do you find out about it?

A. From our customers.

Q. And—

A. Or through our salesman from customers. Our source is the customer, and we learn that sometimes direct from him, and sometimes through our salesman, or both, I will say, in practically every case.

Q. And when you hear—get this information—what do you do?

A. Well, we ask for copies of quotations, and ask our salesman to test the territory and see if he has a random quotation or if there is a general change in price at a number of points, and if it has been followed by some other company, or by more than one.

28813 Q. I believe a little while ago, Mr. Warren, you testified that on getting these quotations from the field you checked them to see if there was any pattern, and that you found a pattern of a figuring point or basing point to which freight was added.

Now, would you tell us how you know the quoting company arrived at its price in the matter of base plus freight?

A. How they arrived?

Q. How do you know that they arrived at it in that manner?

A. Well, only if a number of quotations—with the destination price reduced by the amount of the freight, gives a repeated figure.

Q. It is only from the quotation, then?

A. Only from the quotation, yes.

Q. Now, in checking those quotations which you pick up, do you check back to all mills, or only to so-called base mills?

A. Oh, we check to all mills within a range that could possibly affect that destination.

Q. Would you tell us whether or not the fact that this mill had or had not been a base or non-base mill has any effect on whether you check it?

A. No, none, because that would change without any warning; a check from each to know what you are doing.

Q. Would you tell us whether or not that is the
28814 manner in which you determine when a mill makes a change from a base to a non-base?

A. That is the manner, yes.

Q. Now, if you find from these quotations that there is a general lowering in destination prices, what do you do?

A. Decide whether or not we want to follow it, and if we do we issue quotations immediately.

Q. Do you inform your dealers of your desire to meet the lower quotations?

A. Just—

Q. Before you broadcast quotations?

A. Just as quick as we can. In some cases it would be at the time of the broadcast and in other cases it might be before.

Q. And how do you inform them?

A. By telephone or through salesmen we can reach. We don't want to lose a carload of business because of waiting for the mail.

Q. Will you tell us whether or not, Mr. Warren, from your experience, that information concerning a price decline becomes known any sooner by your salesmen if your competitors are quoting verbally, or whether they have broadcast quotations?

A. Well, I don't think it would make any difference, except, in a case where a secret price was quoted verbally. The general market quoted verbally, that news would travel about as fast, I would think, as a printed quotation.
28815 If the price is down, the customer is interested at once.

Q. Well, do you know any method of quoting a price reduction without that information becoming known in the trade?

A. No.

Q. Now, we have been talking about price reductions. When you secure information concerning a price advance, what do you do?

A. We make the same investigation, check in the same way, see if the advance covers a number of points, and if it is followed.

28827 Q. Mr. Warren, was this price change contained in Respondents' Exhibit 1645—through 1668 a price reduction or a price advance?

A. A reduction.

28828 Q. Well, at the time, how did you know that it was a price reduction?

A. The prices quoted were lower than our prices to the same people.

Q. Did you or did you not compare these price quotations with the price cards which you had on file?

A. We did.

28829 Q. Now, did you meet this price reduction?

A. Yes, sir.

Q. Did you send out quotations to this effect?

A. Yes.

Q. Now, when you acted as you stated you did in answer to a question by the Examiner on that file, was that all of the information which you had concerning your competitors' prices?

A. Yes.

Q. In other words, you had none from other competitors?

A. No.

28830 The witness identified Resp. Ex. 1669 as a copy of a notice to Southwestern's salesmen informing them of its meeting the lower prices.

Voir Dire Examination by Mr. MacIntyre.

28831 It was not written by him. The author was Mr. Noland. It was addressed to Southwestern's salesmen and to Mr. W. J. Jennings who was in the sales department of Southwestern in 1935.

Mr. MacIntyre: If Your Honor please, we object to the writings of a person who has not been presented for examining and subjected to cross-examination as to the meaning of the letter.

Mr. Paulson: I further object, Your Honor. We are going into a lot of needless detail here. The witness took the stand and told us he used the basing-point method in pricing, he took the base price and added the freight rate out of the Institute book, and thereby got the destination prices. Now, what he does, how he does that is not important, not at all important. That he does is important. He came in and admitted it, and they should

28832

have taken him off the stand, I think; there was nothing more to talk about. We do not need all these papers. There is nothing in issue, just showing us the details how they take part in this conspiracy.

Trial Examiner Norwood: Let me see that paper.

(Mr. Withrow hands paper to the Trial Examiner.)

Mr. Withrow: Your Honor, it just completes the file which has just been offered.

Trial Examiner Norwood: The objection is sustained.

28834 Q. But how do you inform the salesmen? Do you give them a list of destination prices, or—

A. No, no; we tell them the figuring point, or the figure which repeats itself from the destination prices in the area in which his territory is affected.

Q. By a figuring point, do you mean a basing point?

A. Yes.

Q. What do you mean, when you used it, a while ago, the term "base price"?

A. Well—I don't know that there is any such thing—our price is made at destination, and the— If I referred to that term, I meant the base figure, the figure which repeats itself when we subtract freight from destinations from a number of points, back to the mill. It is the figure, not a price.

28835 The witness identified Resp. Exs. 1670 through 1687 as Southwestern's file concerning a price change in 1936. The writing in ink in the lower left-hand corner of Resp. Ex. 1670 is his. The pencil writing on Resp. Ex. 1670 is Mr. Noland's. The initials on Resp. Ex. 1671 are Mr. Noland's. The handwriting which ap-
28836 pears on Resp. Exs. 1672 A, 1673 A, 1674 A is Mr. Noland's. The pencil writing on Resp. Exs. 1675
28837 through 1683 and on Resp. Exs. 1684 to 1686 is Noland's. Resp. Exs. 1679 and 1680 are in the condition in which Southwestern received them, that is, in one instance the name of the dealer is cut out and in another instance, both the name and the address.

Trial Examiner Norwood: Yes.

Mr. Withrow: The name of the dealer.

By Mr. Withrow:

Q. Is this the file, Mr. Warren, on which you relied in making your decision about the price change referred to?

A. Yes, sir.

Trial Examiner Norwood: Well, now, that price change, was that up or down?

The Witness: That is a reduction.

28838 Trial Examiner Norwood: A reduction?

The Witness: Yes.

Trial Examiner Norwood: Did you have to rely on anything after you received the information and became convinced?

The Witness: No, sir.

Trial Examiner Norwood: You always met a reduction immediately, don't you?

The Witness: Sir?

Trial Examiner Norwood: You meet a reduction immediately, don't you?

The Witness: Well, as soon as we find that it is general; yes, sir.

Trial Examiner Norwood: Yes.

Trial Examiner Norwood: And these are the papers that convinced you that price reduction had been made?

The Witness: Yes.

Trial Examiner Norwood: Is that right?

The Witness: Yes.

Trial Examiner Norwood: All of those are various destinations picked up in the field?

The Witness: Yes, sir.

Trial Examiner Norwood: And including the

28839 letter from your salesman transmitting some of them; is that right?

The Witness: Yes, from our sales office manager.

By Mr. Withrow:

Q. Did you authorize the meeting of this reduction on the basis of this file?

A. Yes, sir.

Q. Did you instruct that salesmen be informed—

A. Yes.

Q. —that you were meeting this reduction?

A. Yes, sir.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibits 1670 through 1687, and, in the case of the quotations which start with No. 1672, and go through 1686, I offer only the "A" side,—I see no reason for offering the reverse side of the quotations.

28841 Examination on Voir Dire.

28843 Mr. MacIntyre: Your Honor please, with respect to these exhibits, that is Respondents' Exhibits 1670, 71, and 1687, we object to them because they are writings of an agent of one of the Respondents who has not been presented for cross-examination.

With respect to the factual statements that he has made in these documents, and with respect to the other exhibits as well as those in this offer, we object because they add nothing to the witness' testimony, therefore they are irrelevant and immaterial to the issues. They are cumulative, and the offer that preceded this one, as I understood it, was for the purpose of showing the practice of this Respondent in this case considering certain information irrespective of whether it was true or not in determining price changes.

If this offer is for that purpose of course it would be cumulative; if it is for any other purpose, that is, for the truthfulness of it, it would be hearsay, and for that reason we would object; and before stating a further objection I would like to ask the witness one further question.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

28844 Q. Can you tell me whether or not that as a result of any of that information that is contained therein, or any consideration that you gave to that information, you made any change in any of the pricing structures of your company so as to result in any return for the cement that you sold—that is, return at your mill, or otherwise?

Trial Examiner Norwood: Did it change your method in any way whatsoever from what it would have been without those papers?

The Witness: Well, I could not have acted on a price change without some such information.

28845 Trial Examiner Norwood: The only thing they did, then, was to simply acquaint you with what your competitors were charging; is that right?

The Witness: That is right.

Trial Examiner Norwood: And you have told us that you did secure that knowledge, and that you did meet the price, didn't you?

The Witness: Yes, sir.

By Mr. MacIntyre:

Q. Will you please state, Mr. Warren, whether or
28846 not that you took any action as the result of the information that you have gathered from these exhibits that resulted in any price change or return in your mill net?

A. It resulted in a price change.

Trial Examiner Norwood: Did a price change result from that information?

The Witness: Yes, sir.

28847 Trial Examiner Norwood: Without going any further, I think I shall sustain an objection and reject the exhibit.

You have already led him some to illustrate his method. From his answers to my questions I think that it will not add anything to the testimony of the witness, and that they should be rejected.

Mr. Withrow: Your Honor, I want to make an offer of proof with reference to Respondents' Exhibits 1670 through 1687, inclusive, to the effect that if these documents were admitted, and the witness allowed to testify from them, that they would show that he relied upon these papers in making a price change in December, 1936, and he did not get the information from his competitors, and would negative any allegation, inference, or charge that this Respondent was in any conspiracy or agreement with any competitors with respect to this change in price.

Trial Examiner Norwood: If those papers show that they should certainly be admitted.

28848 Mr. Withrow. Well, they tend to prove it and they bear on that issue.

Trial Examiner Norwood: I cannot see anything, or how they tend to prove it any more than what he has already said that he picked up this information in the field. Doesn't that negative his getting it? He has negatived getting it directly from his competitors. Now, what more could those papers show?

Mr. Withrow: This is the direct evidence which was gathered at that time, and upon which this witness relied, Your Honor, and it is the best evidence of how this situation was handled in so far as this company was involved, and we maintain that it should be received into evidence at this time.

Mr. Paulson: Your Honor, I would like to have you look

at these exhibits if you are considering changing your ruling, before you do, or if you are I would like to show you those exhibits.

Trial Examiner Norwood: They are marked for identification and both the Commission and the courts may look at them and see if they prove enough to entirely settle the issues in this case.

In my opinion they prove nothing of the kind nor do they throw any light on it any further than what this witness' testimony has already thrown.

28849 *Direct Examination by Mr. Withrow (Continued).*

Q. Mr. Warren, have you ever experienced, since you have been at the Osborn mill, a reduction in freight rates?

A. Yes.

Q. And will you tell the Examiner whether or not in the event of a reduction in freight rates you immediately reduce the price or whether you pick up quotations in the field and found what your competitors did?

A. Well, the reduction in freight rates would not prompt us to change our prices unless we found that destination prices to points that we attempted to ship cement to, that would change.

Q. Now, I call your attention again to Respondents' Exhibit 1670, and to Respondents' Exhibit 1687, and ask you if this is an instance where the freight rates were reduced and you first checked quotations before meeting lower prices?

A. It is; yes, sir.

Mr. Withrow: Your Honor, I renew the offer of Respondents' Exhibits 1670 and 1687 on the basis of this additional showing.

Mr. MacIntyre: I renew the objection that the exhibits add nothing to the witness' testimony, and are therefore immaterial.

Trial Examiner Norwood: I renew the ruling 28850 and reject the proffer.

Mr. Withrow: I renew the former offer of proof, but to that I add the additional offer of proof to the effect that these documents show that this company does not calculate its prices on the basis of base plus freight, but, in fact, in the event of a decline in freight rate has waited

and did in this instance wait to find out what the lowest prices were quoted by its competitors in the field.

28851 Mr. Withrow: I am not sure I asked—but, just to complete the question with reference to this group of exhibits—

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. —Respondents' Exhibits 1670 to 1687, is that, 28852 as you recall it, Mr. Warren, all the information you had concerning this change at the time you authorized—

A. Yes, sir.

Q. —the change being made?

A. Yes, sir.

Q. Did you consult with your competitors about this change?

A. No.

Q. Did you agree with your competitors concerning this change in price?

A. No, sir.

Q. Would you tell us whether or not these exhibits, Respondents' Exhibits 1670 through 1687, whether or not that represents the office routine which you followed in the event of a price change?

A. That is the routine and the method used in connection with every price change.

Mr. Withrow: I would like to have these papers marked, Your Honor (presenting a file of documents to the Reporter).

Trial Examiner Norwood: Now, if they are similar to the documents that have been ruled out, I am not willing to mark them for identification; unless the Counsel can assure me that they are different there is no use taking time marking papers.

Mr. Withrow: Well, Your Honor, these are about 28853 specific price changes which have been put in issue by the Commission.

Trial Examiner Norwood: Yes.

Mr. Withrow: As part of their case, and in order to perfect our record, I think it is necessary—

I think I can expedite this by handling a number of the files to the Reporter at one time, and maybe she could bring in some help to number these more expeditiously.

Trial Examiner Norwood: Cannot you save that a little while until we are ready to have a recess?

Mr. Withrow: Why, Your Honor, I would prefer to have all of these price changes at one place, and get them out of the road. If they could get another Reporter in here they could be numbered pretty rapidly.

Trial Examiner Norwood: Unless Counsel can assure me they are going to be offered under a different basis, and are different from the documents we have just excluded, I shall not mark them at all, or order them marked, because we are just wasting time.

You have your exception. One exception is as good as two.

The record may show that you offer a certain number of documents, and you can say how many, that are similar to the ones just excluded.

Mr. Withrow: I offer to prove through these ex-
28854 hibits which Your Honor has not allowed me to have marked--

Trial Examiner Norwood: Well, now, describe the exhibits. Make a fair proffer.

Mr. Withrow: I will. I will try to, Your Honor.

Trial Examiner Norwood: Do not just simply offer to prove that--

Mr. Withrow: --that on October 1, 1937, this witness authorized the meeting of certain prices in Northern Ohio, which reflected a reduction in price amounting to approximately 15 cents per barrel, and to prove that this inter-office memorandum to Mr. Warren, with the documents attached, consists of the material on which Mr. Warren relied in authorizing that this price change in delivered prices be met; and that there are inter-office communications from salesmen, together with quotations attached, showing this change in destination prices, and, finally, that on October 1, 1937, from a memorandum from the sales office to all salesmen, they were informed of this change in price in Northern Ohio.

Trial Examiner Norwood: Now, those documents are similar in character to Respondents' Exhibits 1670 to 1687 that have just been rejected; is that right?

Mr. Withrow: Well, they are somewhat similar, Your Honor--

Trial Examiner Norwood: Yes.

28855 Mr. Withrow: —but they deal with different price changes.

Trial Examiner Norwood: Yes.

Mr. Withrow: Which the Commission has put in issue, and this file, and the change authorized on September 30, 1937, consists of 14 documents; and at the same time, I might as well complete an offer of proof—

Trial Examiner Norwood: Yes.

Mr. Withrow: —on 71 additional documents, through which I offer to show that—

Trial Examiner Norwood: Well, describe your documents; tell us what they are.

Mr. Withrow: —that on March 16, 1937, this witness authorized the issuance of new quotations to the trade which reflected an increase in price in Southern Ohio, amounting to 10 cents a barrel, and that this file of papers is the file on which Mr. Warren acted in authorizing that increase; and that this file consists of inter-office memos, reports from salesmen, and quotations picked up in the field concerning changes in destination prices of competitors.

I further offer to show that on October 14th, this witness—

Mr. MacIntyre (Interposing): What year?

Mr. Withrow: 1937. —authorized a change in
28856 price which reflected certain changes in freight rates, and other matters, in the State of Kentucky; that the file consists of material upon which Mr. Warren relied, consisting of inter-office memos, salesmen's reports, and trade quotations to dealers which were picked up in the field, or mailed in by salesmen, together with a report, or announcement, to the salesmen informing them of this change.

And, I offer to show that on November 19, 1937, this witness authorized an issuance of quotations to dealers in the State of Kentucky, increasing the price at certain destinations, and that he relied upon this price file, which consists of inter-office memoranda, and quotations, picked up in the field by salesmen of the Southwestern Company, or mailed in directly to the Southwestern Company.

And I also offer to show that on April 13, 1938, this witness authorized the issuance of new quotations reflecting a change in price throughout his territory,—or throughout the territory where he does business,—and that this

change—or, these prices—resulted from the information which he found which was given to him in inter-office memoranda and from quotations picked up in the field by his salesmen, and that this file is the file upon which he relied in informing his salesmen of the change in price,
28857 and authorizing the change in price.

And I further offer to show through this witness that in none of these instances was any information sent to him by competitors concerning this price change, and that he did not communicate with them, or consult with them, concerning whether or not he should meet these changes in price.

Trial Examiner Norwood: Now, how did the papers show that? How do the papers show that he did not consult with anyone?

Show me a single paper that shows that.

Mr. Withrow: These papers tend to show—

Trial Examiner Norwood (Interposing): No, no.

Mr. Withrow: —and do show the manner in which this witness acted.

Trial Examiner Norwood: Yes.

Mr. Withrow: And on the papers, the reasons all become very apparent as to why the changes are made.

Trial Examiner Norwood: Is there anything in those papers that the witness cannot tell us about here on the stand, and be cross-examined on?

Mr. Withrow: Well, he cannot very well tell us what quotations he picked up and relied upon, because certainly we could not expect anybody to remember that.

Trial Examiner Norwood: He could have those papers to refresh his memory.

28858 Now, those documents are similar in character to Respondents' Exhibits 1645 to 1668, which we admitted for purposes of illustration, and also to Respondents' Exhibits 1670 to 1687, which were rejected, and on which the Counsel has his exception.

Is that not a fact?

Mr. Withrow: Well, they are similar, Your Honor.

Trial Examiner Norwood: Yes.

Mr. Withrow: In that they come from the price files of this company.

Trial Examiner Norwood: Yes.

Mr. Withrow: But they deal with different matters.

Trial Examiner Norwood: Yes. Aren't they similar

in every respect except that they deal in another price change?

Mr. Withrow: Well, in each instance of meeting a price change there are different reasons, and these reflect those different reasons for meeting a price decline, or the going along on the price advance.

Trial Examiner Norwood: Yes.

Mr. Withrow: So, in that respect they are not similar, but they are part of the price files, and this company—the witness has testified that they handled these price changes in a similar manner.

Trial Examiner Norwood: Yes.

28859 I shall not waste time by having those marked, but you can bring out anything there that is relevant and material by this witness who is now on the stand. You may ask him about it.

28862 Trial Examiner Norwood: Now, the witness is on the stand. You go right ahead and ask him to 28863 tell you about those things.

Mr. Leisure: It is the point of our argument—

Trial Examiner Norwood: Yes.

Mr. Leisure: —if the Examiner pleases, that the oral testimony as to this price change some five or six years later by this witness, is not the best evidence. The best evidence is the documentary evidence, as of the time the transaction took place.

Trial Examiner Norwood: Let the Commission raise that. That is not for you to raise.

By Mr. Withrow:

28864 Q. Mr. Warren, do you recall a price change around October 13, 1938?

A. Yes, sir.

Q. What information did you have in your hands at the time you made a change in price?

A. A number of quotations secured by our salesmen from our customers.

28866 Q. Did you have any other information, Mr. Warren?

A. Only an analysis made from them by Mr. Noland, of our sales office.

Q. Did you receive any information from competitors?

A. No, sir.

28867 Q. Now, did you make this price change, or would you tell us whether or not you made this price

change in April, 1938, because you had received any correction sheets to the Institute freight rate books?

A. No. We made our price change based on destination prices found in the territory.

Q. Do you know, Mr. Warren, whether your company made and followed a price change around March 16, 1937?

A. Yes.

Q. Could you tell us upon what information you relied in making that price change?

A. We relied on quotations secured from customers and our salesmen.

Trial Examiner Norwood: Well, is there any difference in which you relied on that time and what you always rely on?

28868 The Witness: No difference.

Trial Examiner Norwood: That applies to every change you have made?

The Witness: Every price which I made has been based on that study.

By Mr. Withrow:

Q. And to sum up in all of these cases, that is in March, 1937, November, 1937, October, 1937, the three remaining, did you receive any information from your competitors?

A. No.

Q. And did you make these changes because you received any correction sheets from The Cement Institute?

A. I did not.

Q. Mr. Warren, do you recall the price change around October, 1937, when the price was reduced to Northern Ohio?

A. Yes.

Q. Did you withdraw from this market around Cleveland as a result of this change in price?

28870 A. Yes.

28875 Q. Mr. Warren, in your testimony you have repeatedly used the words "price reduction." What do you mean by the words "price reduction"?

A. Lowering of the destination price to a given point.

Q. Would you distinguish between the term "price reduction" and "price cutting," in your mind?

A. I would say a price reduction is a lowering of the published or known price that anyone makes, whereas a price cut would mean to me that the man has reduced that

public or published price simply to some one or more prospective buyer.

Q. Do you, in accordance with your definition of price cutting, do you find price cutting prevalent in your market area?

A. Well, more or less I think from time to time; I would not say it is prevalent, no.

Q. Well, what effect does this price cutting have on the market?

A. Well, it is discriminatory to some buyers if practiced, and if practiced generally it becomes demoralizing and tends to lower prices.

Q. Now, what is the policy of your company with
28876 reference to this matter of granting secret concessions?

A. Our policy is against it.

Q. In your opinion is it possible to make a sub rosa or secret concession or price cut?

A. Well, I presume it could be secret for a time. I think it is more or less; secret is a relative term, isn't it? It would be a secret to some and known to others.

Q. Well, how long have you found that such secret concessions remain secret?

Q. Have you ever found any secret concessions by your competitors?

A. Well, they were not secret after I found them. They had been secret.

Q. Well, how long did they remain secret; that is, before you found out about them?

A. Well, the time would vary, but generally it comes out rather soon, I would think.

Trial Examiner Norwood: Does the maker of these prices come in for a good deal of adverse criticism by his competitors when it is found out?

28877 The Witness: I would know more about what his criticism is by his customers; I hear that.

Trial Examiner Norwood: They would criticize him.

The Witness: Yes.

28887 By Mr. Withrow:

28888 Q. In that instance, you are referring to, that is the Cincinnati instance?

A. Yes, sir.

Mr. MacIntyre: May we have the date on that again, so that the record will be kept clear?

Mr. Withrow: It is in the record.

Trial Examiner Norwood: What is the date?

28889 Mr. Withrow: December, 1938.

Mr. MacIntyre: A week after this man testified—

Trial Examiner Norwood: I have already ruled. Counsel has an exception, but I am not going to receive any further testimony on the particular transactions that occurred subsequent to this complaint, and if you will point out in the record where we have inadvertently received such testimony heretofore, or evidence, I shall entertain a motion to strike it.

That is the best way to do it.

Mr. Withrow: Your Honor, at this time I move to strike all of the Commission's exhibits dated after July 2, 1937, and, more specifically, Commission's Exhibits from 1339 through 1412.

By Mr. Withrow:

Q. Do you enter into contracts with your dealers?

A. Yes; sometimes.

Q. And do these contracts contain your terms and conditions of sale?

A. Yes, sir.

28890 Trial Examiner Norwood: Now, I will ask Counsel not to have anything marked that is dated later than the issuance of the complaint. Let us not waste any more time on that.

By Mr. Withrow:

Q. Would you take these, Mr. Warren, and state briefly what they are, and tell us at the same time whether or not they are in use at the present time, and whether or not they started to be used after July, 1937, if any of them do?

A. 1692-A is an order form used by salesmen in soliciting business, and 1693-A is a letterhead containing on the back the terms and conditions of sale generally used in quoting specific jobs. 1694 and 1695 are specific work sales contract forms. 1696-A is a specific sales order; 1697-A is a sales contract. These have been in use

28891 for a number of years prior to the date —

Trial Examiner Norwood: All of them have been in use for a number of years?

The Witness: Yes, sir.

By Mr. Withrow:

Q. Would you tell us, Mr. Warren, whether 1695 is still in use?

A. Seldom. That is one of the older forms.

Q. Now, I notice on some of these forms that there are certain material stricken out in red pencil. Were those changes made in your office?

A. Yes, sir.

Q. And were they made prior to July, 1937?

A. Yes.

Q. And that applies to 1695, and 1696, just those two?

A. It applies to these two; yes, sir.

28896 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Taking this Respondents' Exhibit 1695-A, you note that four or five paragraphs from the top in the right margin appears a red pencil mark opposite one and one-half paragraphs. Can you tell me whether or not the wording in those paragraphs beside that red mark has been replaced by some other term, or whether it remains?

A. No, I cannot tell you that.

Q. Can you tell us about the paragraph below,
28897 that is stricken there with red, as to whether that remains?

A. Yes, that form was corrected to save reprinting the form as we desired to use it with these changes in.

Q. Is that red in that particular paragraph stricken out as it is stricken thereon by the red,—is it of no further effect, that is, the stuff stricken through with red?

A. Yes, sir.

Q. But you can't say as to the two paragraphs below?

A. No, that does not add nor detract from the form as far as I am concerned.

Q. What does the red mark mean?

A. I have no idea. It does not mark out anything in the copy. It does not alter the contract; whereas, this changes—this does rule out conditions we desired to omit and save reprinting in the form.

Q. Now, as to 1696-B, the red mark in the left margin opposite paragraph entitled "Time of Delivery," and the one beginning with "The seller reserves the right to select the route," and so on, what does the red mark there mean? Has that been stricken out as the result of the

red mark, or has it been affected in any wise by the red mark? Can you state whether or not it has full force and effect?

A. No. That has no force and effect because it refers to the Code Authority which no longer exists.

Q. Yet it is not stricken through there, is it?

28898 A. No, it is not.

Q. What about the one at the bottom of that page that is stricken through, what does that mean? What does the striking there with red mean?

A. It means we use this form modified by that correction.

Q. Well, what do you mean "by that correction"?

A. This marks out those, so far as our terms and conditions of sale; this form is as though that did not appear.

Q. But there is another provision there that is not so stricken, has no effect, just as much so as the one stricken there?

A. Not on this form.

Q. But it is on the form?

A. It is on this form, yes.

Mr. MacIntyre: Your Honor please, it adds confusion and uncertainty as to what in these forms was effective and what are not effective.

We object to it unless it is made clear for the record what we are receiving in evidence. We do not know—we receive them as forms used by the company presumably as conditions and terms of sale as stated therein effective, and yet the witness tells us with respect to some that they are not effective, and that others, it appears to him, that they are effective. Yet there is no definite and certain showing in the offer as to which

28899 ones are and which ones are not effective. It just confuses the record to receive them in that shape.

28901 By Mr. Withrow:

Q. Mr. Warren, I show you Respondents' Exhibit 1692-A and B, which I believe you said was a purchase order filled in by your salesmen, and ask you whether that is a form which you now use or whether that is an old form which you no longer use?

A. We now use that form.

Trial Examiner Norwood: How long have you used it?

The Witness: For several years; ever since I have been with the company.

Trial Examiner Norwood: Does that have the terms and so on?

The Witness: Yes, sir; on the back.

(RESP. EX. 1692-A and B was offered and received in evidence.)

28902 Resp. Ex. 1693-A and B is the form which Southwestern now uses.

28903 (RESP. EX. 1693-A and B was offered and received in evidence.)

Resp. Ex. 1694-A and B is the contract form which Southwestern executes with dealers. It has been used for several years.

28904 (RESP. EX. 1694-A and 1694-B was offered and received in evidence.)

By Mr. Withrow:

Q. Now, I show you, Mr. Warren, three exhibits, 1695 and 1696-A and B and 1697-A and B, all of which purport to be specific job contracts, and ask you to tell us if you can whether all three of these contracts are in effect today, and if not when, to your best recollection, each of these contract forms was used?

A. 1696-A is a specific sales order form that we now use and which we began using, to the best of my recollection, in 1934. We originally used it as the type of printing shows, but since modified it,—since deleted the last paragraph on 1696-B, during which time we used the form as printed, and 1695 is a form for specific work sales contract that we now use as corrected by interlining here in red. This form, to the best of my recollection, that was adopted in 1934.

Q. Did you testify about 1697?

A. 1697-A is a sales contract which is now in use and has been in use for a number of years.

28905 Q. Mr. Warren, I am not sure I got straight what you said about 1696-A and B. Do you mean that this is now in effect, the reference to the N.R.A. Code or cement industry?

A. That is not in effect.

Q. And when was the last date you used that form, 1696?

A. Well, I could not fix that with great exactness, but it was soon after the discontinuance of the Code Authority. I would say late in 1935 or early in 1936.

Q. Now, do these little pencil marks on the side, do they, to your knowledge, and information, have any effect upon the terms and conditions of sale when each of these were used?

A. No, sir.

Q. Do they modify it?

A. No.

Q. Do they indicate that there were additional terms not shown on here?

A. No, sir.

28906 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Take Exhibit 1696-B, the fourth paragraph from the bottom, beginning with the words "The seller reserves." Will you please read to us, Mr. Warren, the portion of that that is not effective as a part of that form now, and tell us when it became ineffective, dropped as a part of the form?

28907 Q. Tell us what part of that in that paragraph is not effective and when it became ineffective?

A. From the beginning to the end of the first sentence.

Q. Beginning with the words "The seller reserves"?

A. Beginning with the words "The seller reserves" and ending with "Code Authority."

Q. That is, ending with the words "Code Authority," just before the word "transportation," about the middle of that paragraph?

A. Yes.

Q. Now, except for that, and then the portion at the bottom that is stricken out, all the rest of it has continued as an effective part of the form?

A. Yes.

Q. Used by your company?

A. Yes, sir.

28908 (RESP. EX. 1696-A and 1696-B was offered and received in evidence.)

By Mr. MacIntyre:

Q. Will you tell us as to Exhibit 1695, whether or not any part of that form is not effective now, Mr. Warren, and, if so, what part, and when it became ineffective?

A. That part, that whole paragraph is effective.

Q. Well, I am asking you now about the part that is

not effective. Is any part of it not effective today, and just tell us, is it the part that is stricken there in red?

A. It is the part that is stricken there.

Q. All the rest is effective?

A. The top that is stricken through in red. The rest is effective; yes, sir.

Q. As to the part stricken in red, when did it become ineffective?

A. That date I cannot fix exactly.

Q. Can you tell us approximately?

A. 1934 or 1935, to the best of my recollection. There have been in recent years changes in freight rates, the emergency freight charges on and off, and several of the others that I have never had occasion to fix those specific enough in my mind to give a more accurate answer.

Q. Will you tell us when 1697-A and B became effective?

28909 A. It became effective after the adoption of the Code of Fair Trade Practice of the Cement Industry under the N.R.A.

Q. And has been in force ever since?

A. Yes, sir.

Direct Examination by Mr. Withrow (Continued).

Q. Mr. Warren, do you recall the activity of The Cement Institute committee called the Committee on Forms and Contracts?

28910 A. Yes, in a general way I remember that.

Q. Do you recall about the time this activity took place?

A. During 1934.

Q. Around the N.R.A. Code period?

A. The N.R.A. Code period. Well, that would be the fall of 1933 that the work on the Code was inaugurated,—whether that committee was working at the start I don't recall.

Q. Where did you get the material which you included there in the terms and conditions of sale, and the contract forms?

28911 Trial Examiner Norwood (interposing). Can you answer that, from your own knowledge, that question?

The Witness: Where did I get that?

Trial Examiner Norwood: Yes.

The Witness: Yes, the forms, with the exception of the specific sales order, were in use, and the specific sales order was in process—or was a development of the Code of Fair Trade Practice, and was adopted by our company at that time.

By Mr. Withrow:

Q. And by Code of Fair Trade Practice, you mean the N.R.A. Code?

A. The N.R.A. Code of Fair Trade Practice.

Q. And I believe you testified in answer to something in Mr. MacIntyre's questions to you, that you made certain provisions in those contracts by canceling terms,—that is correct, is it?

A. Yes, sir.

Q. But, do you recall whether or not these provisions were made pursuant to recommendations by The Cement Institute Committee on Forms and Contracts?

28912 A. I believe—I think one or two changes were made pursuant to those recommendations.

Q. Was that during the Code period or after the Code period?

A. During the Code period of the N.R.A.

Q. Is there any agreement between you and any other cement manufacturing company, as to the form of specific job contract, or specific sales order, which you used?

A. No, sir.

Q. Was there any cooperation between you and this committee on forms and contracts, except during the N.R.A. Code period?

A. No, although I think that during that period I might have—I don't remember what I contributed, but I think that I did contribute comments.

Q. And at that time you were a member of the Code Authority, were you?

A. Yes, sir.

Q. Would you feel free at any time, or at the present time, to change the form of those contracts and sales orders?

A. Yes, sir.

28913 Q. Mr. Warren, I show you Respondents' Exhibit 1698, and ask you whether it was prepared under your supervision (showing document to witness)?

A. Yes. I asked that that be prepared.

Q. And from what material was it prepared?

A. Taken from our delivered prices at Cincinnati, Columbus, and Dayton over a period of years.

Q. And this is a summary?

A. A tabulation of the information that I asked be prepared covering that period in those places.

Q. And does this show all of the changes in your announced prices at those points?

A. Yes, every one during that time.

Trial Examiner Norwood: Does it show what date?

The Witness: The date is January, 1928, to November, 1937.

Trial Examiner Norwood: Yes.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibit 1698 (handing document to Mr. MacIntyre).

28914 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Can you tell us, Mr. Warren, which of the figures that appear opposite dates on that sheet reflect changes in freight rates, and only freight rates (showing to witness document marked for identification Respondents' 1698)?

28915 A. Well, none of them reflect only freight rates. They reflect our delivered prices at these cities at the time indicated, on the dates indicated.

Trial Examiner Norwood: Well, does it show which changes were made,—which include merely a read-

28916 justment by reason of a change of freight; or rearrangement by reason of a change of price from other sources? Can you tell us that from that sheet (referring to Respondents', for identification, 1698)?

The Witness: I can't tell the cause of the price changes, and, therefore, I couldn't answer Mr. MacIntyre's question.

Mr. Withrow: You see, Your Honor, this witness has testified that he changes prices not when rates change, but when he finds destination prices changed, and these are destination prices.

By Mr. MacIntyre:

Q. I just want to know if I understand the record now, Mr. Warren, to be your testimony—

Trial Examiner Norwood: Yes.

Q. —as to this, that none reflect freight rate changes, none of this information appearing in there reflect freight rate changes?

A. Freight rates have been changed many times during that period, Mr. MacIntyre.

Q. I have asked you, and I am asking you now, whether or not I understand your testimony to be that none of the information appearing on this offer reflects freight rate changes (referring to Respondents' Exhibit, for identification, 1698)?

28917 By Mr. MacIntyre:

Q. It is your testimony that none of it does so reflect freight rate changes?

A. No, no.

Q. Which is correct? Is it your testimony that none of it does reflect freight rate changes?

A. No, it reflects only our delivered price quotations at those cities on those dates.

Q. And none of it reflects freight rate changes?

28918 A. No.

Trial Examiner Norwood: Any objection to the paper?

By Mr. MacIntyre:

Q. Can you tell us when this was made up, this information on that sheet of paper,—placed on that sheet of paper (showing to witness Respondents' Exhibit 1698, for identification)?

A. About—I think about two years ago.

Q. Put on this piece of paper two years ago (indicating Exhibit 1698)?

A. Oh, oh, I can't say as to that, sir, no.

Q. You can't tell us when this tabulation was made up on this sheet of paper (indicating)?

A. No.

Q. You can't tell whether it was a week ago or a year ago or two years ago?

A. No, I can't tell when that was made up—the study was made of which this is a copy.

Q. Was it made on this sheet of paper, in this form, for use by your company, or use in this case here?

A. I can't say as to that.

Q. Has your company used it on this sheet of paper in this form since it was made up, for any purpose?

A. Oh, I have—

Q. For what purpose?

28919 A. If this actual sheet of paper I can't answer, I can't identify.

(RESP. EX. 1698 was offered and received in evidence.)

Direct Examination (Continued) by Mr. Withrow.

Q. I see, in the righthand column of this Respondents' Exhibit 1698, Mr. Warren, under the column marked "Discount," "10-10-15 days." Would you just tell us what that means?

28920 A. Oh, the last figure is the number of days during which a discount will be allowed. The first figure is the cents-per-barrel allowance and the second figure, where there are three, is the cents-per-barrel allowance.

Q. You mean—

A. For example, "10-10-15" means 10 cents' discount, 10 cents discount if paid in 10—in 15 days.

Q. And that first 10 cents' discount, was that a dealer discount?

A. That's a trade discount; yes, sir. The other is a cash discount, a discount for cash if paid within the time specified.

Q. And down further it says: "10-15-5 at end of year," —would you just tell us what that means?

A. Well, that is a trade discount supposed to be paid at the end of the year.

Q. That means 5 cents?

A. Five cents a barrel, and the "10-15" is 10 cents discount if the bill is paid within 15 days.

Q. Mr. Warren, were you ever a purchaser of cement?

A. Yes.

Q. Under what circumstances?

A. Well, I was once in the construction and contracting business.

Q. How did you purchase cement?

28921 A. From dealers, in all cases.

Q. And on what basis?

A. On the basis of the price at the point of use,—at the destination.

Q. Why did you buy it at the price at point of use?

A. Well, that's the only place I was interested in price.

28922. Trial Examiner Norwood: You were a contractor?
The Witness: I worked for a contracting company.
Trial Examiner Norwood: And you bought the cement?
The Witness: Yes, sir.

By Mr. Withrow:

Q. Now, as a purchaser—

Trial Examiner Norwood: Now, did you figure at all at that time—did you try to figure on prices a little, and try to figure out if you could save any money by it, by saving transportation costs, and so on?

The Witness: Well, we—we were competitive bidders on construction work, and bought our commodities as cheap as we could get them. We wanted our cement at the site of the work, and secured prices at that point.

28923 Trial Examiner Norwood: Well, didn't you want to know how that delivered price was made up?

The Witness: I don't recall that I did; no, sir.

By Mr. Withrow:

Q. Did you ever request the privilege of buying cement f.o.b. mill?

A. No.

Q. And that is as a purchaser.

Could you tell us whether or not the Osborn mill now sells exclusively at destination prices?

A. Yes, sir.

Q. Could you tell us why you sell f.o.b. destination?

A. Well, that's where I meet the market, and that's where our customers want the cement, and ask for the prices.

28927 Q. Did you ever receive inquiries from contractors concerning the price of cement?

A. Yes, we get those frequently.

Q. And on what basis do they ask for prices?

A. The price at the point of the job, where they are figuring the work.

Q. Is that the usual way in which they ask for prices?

A. Yes, that's the customary way.

28928 Q. How does the State of Ohio ask for bids?

28929 Trial Examiner Norwood: Read the question there.

Do you know how the State of Ohio asks for these bids?

The Witness: Yes, they ask for bids at delivery points.

Trial Examiner Norwood: At the present time?

The Witness: Yes.

Trial Examiner Norwood: Do you know how they asked for them ten years ago?

The Witness: No; I know for seven years.

Trial Examiner Norwood: That they have asked for them—

The Witness: For seven seasons, asked for them at delivery points.

Trial Examiner Norwood: All right.

Mr. Withrow: During those seven years, did they
28930 ever ask for f.o.b. mill basis?

The Witness: No, sir; not to my knowledge; never asked us for them.

The witness identified Resp. Exs. 1699, 1700 and 1701 as copies of bids made by Southwestern on invitation from the State Highway Department, Columbus, Ohio. The word "Wabash" written in red pencil by Mr. Noland on the face of Resp. Ex. 1699 means that the contract was awarded to the Wabash Company. The word "Columbia" written on Resp. Ex. 1700 means that that contract was awarded to Pittsburgh whose brand name is "Columbia". He identified Resp. Exs. 1699 B, 1700 B and 1701 B as requests of Southwestern's salesmen to secure tabulation of the
28931 bids. It is Southwestern's practice to follow the openings of these bids and that is the purpose of Resp. Exs. 1699, 1700 and 1701 B. These invitations are typical of the invitations which Southwestern received from the State of Ohio and this is the manner in which they have been handled and received since he came with Southwestern at Osborn.

28933 With respect to connection between Resp. Exs. 1699 to 1701 and Resp. Exs. 1702 to 1704, Resp. Ex.
28934 1699 A is a copy of the bid which Southwestern made at Middletown, Ohio, showing the price bid in paper bags and on the card on which it files its commercial price at Middletown, Ohio which price on its Miami cement is $2.39 in cloth. This shows that Southwestern bid the State its commercial price at Middletown because the difference in the allowance as between cloth and paper bags is 25¢ as shown by the differences in the figures. And at New Philadelphia, Ohio, a comparison of a copy of Southwestern's bid with the card from its price files shows the same relation, the bid being in paper sacks 25¢ less than its

posted price of Miami cement for New Philadelphia
28935 in cloth. One of these is Southwestern's price card from its file; the other is a copy of the bid to Springfield, Ohio, which bear the relationship of the bid price being in paper 25¢ less than its price card in cloth.
28937 In arriving at the figures bid to the Ohio Highway Department, Southwestern used the price cards. The price has already been calculated and entered on the cards for that purpose. This is typical of the manner
28938 in which Southwestern does that. These cards show just what Southwestern did in these particular instances.

28939 *Examination on Voir Dire by Mr. MacIntyre.*

Q. What purpose are these, and what are these names in vertical across the tops of these cards, Respondents' Exhibits 1702, 1703 and 1704, Mr. Warren?

A. These names?

Q. Yes, what are they?

Mr. Withrow: Your Honor, I object to this. That matter was gone into thoroughly and explained by the witness with reference to another group, to-wit, Respondents' Exhibit 1641, and it is identical.

Trial Examiner Norwood: I think he has a right,
28940 if Counsel wants these to be received, he had better permit this examination.

Mr. Withrow: Your Honor, I think it is taking up time unnecessarily to ask him that. Why not ask him if it is the same as 1641 and finish it?

Trial Examiner Norwood: I have a faint idea this whole business is taking up time unnecessarily, and to no important purpose; and I will say that it is all the more apparent from the record than it is to us here, in the confusion of discussion, and when it gets to the record it does not show up good.

Go ahead.

By Mr. MacIntyre:

Q. Will you answer that question, Mr. Warren?

A. Those are the names of towns or locations of cement plants.

Q. Well, the figures that appear in the—directly above and below the date line, are they the showing of freight rates from those points to Springfield, Ohio?

A. In that case—
Q. That is on 1704, New Philadelphia, Ohio; on 1703.
A. Yes, sir.
Q. And Middletown, Ohio, on 1702.
A. Yes, sir.
Q. Is that correct?
28941 A. That is correct.
Q. And what was the date of the price, the effective date of the price you took from those cards, which you say you used in your bids with respect to Respondents' Exhibits 1699, 1700, and 1701,—what was the date on them, the effective date of the price you stated you took from the cards?
A. Well, it was our price, our commercial price.
Q. As of what date?
A. As of the date of the—
Q. Well, what is the date?
A. Of the bid?
Q. Yes.
A. This is August 21, 1939, and one is August 19, and two are August 21.
Q. In other words, all of them were during August, 1939?
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.

Mr. MacIntyre: Your Honor please, we object to the offer as unduly cumulative, as going into something that is in the nature of a transaction that could not possibly be covered by the complaint because it,—on the basis of the witness' testimony, transactions occurred more than two years subsequent to the issuance of the complaint, and for that as well as the reason that they add nothing
28942 to the witness' testimony, we object to them as being immaterial to any of the issues in the case.

Mr. Withrow: Your Honor, I have one thing I want to say in answer to Mr. MacIntyre's statement.

They have introduced in evidence invitations to bid since the complaint to show the manner in which the industry or companies in the industry responded to those invitations I am now offering these to show that the purchasers of cement, including the State of Ohio, continued to ask for f.o.b. destination bids, and that they are getting what they

asked for, and the testimony is that these are typical of what has happened since March, 1933.

Trial Examiner Norwood: Really, now, coming right down to it, what would that prove?

Mr. Withrow: That proves what the customer wants, Your Honor, the State of Ohio wants delivered prices.

28945 New York, N. Y.,
December 14, 1939.

28946 Trial Examiner Norwood: The hearing will come to order.

In connection with the pending proffer, the objection is sustained. I have studied these carefully over night and I can't see any good purpose in introducing them except for the purposes of delay.

I ask Counsel not to offer or have marked any more papers that show transactions subsequent to the issuing of the complaint, and he had these marked thereafter. I hope that he will not find it necessary to continue this and delay us.

He has his exceptions to all this material here.

28947 Trial Examiner Norwood: No, I did not deny any motion to strike. It sustains the objection to the receipt of those particular exhibits; that is, 1699 to 1704, inclusive.

Now, I said that I would entertain a motion to strike any similar material that is in the record.

Now, in regard to matter showing a continuance of a practice which is shown to have been employed prior to the complaint, that seems to me to be an entirely different matter. There is some logical inference that could be drawn from that, but I will consider each piece of evidence that the Respondent wishes to have withdrawn and try to decide on the merits of each case provided Respondent will specify the parts of the record or the exhibits Counsel for Respondents wishes struck. I do not think we have received anything that is exactly in this category, but I will look them over if you will specify what they are at some future time.

Mr. Leisure: Each of the exhibits which we offered, we

offered them only because they were a continuation of a practice.

Mr. Withrow: Well, Your Honor, we offer to
28948 show through Respondents' Exhibits 1699-A and B, 1700-A and B, 1701-A and B, 1702-A and B, 1703-A and B, and 1704-A and B, that the State of Ohio, a purchaser of Portland cement continued to request bids for Portland cement only on an f.o.b. destination basis, and to show that this Respondent continued to comply with the request of that purchaser of Portland cement, and that it continued after the complaint to fill in the prices bid to the State of Ohio from the price cards found in its files.

Trial Examiner Norwood: You have already shown by this witness that the State of Ohio asked for bids f.o.b. destination, and that is all that is necessary.

I thank the Counsel, however, for the specific proffer.

GEORGE E. WARREN thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow (Resumed)

Q. Mr. Warren, how does the State of Kentucky ask for bids?

A. Destination.

Q. Do you ever recall Kentucky asking for f.o.b. mill bids?

A. No, I do not.

28949 Mr. Withrow: Your Honor, as a result of Your Honor's ruling on our proffer of exhibits showing invitations and the manner in which the Southwestern Company, at Osborn, Ohio, made bids to the State of Ohio, I am not having marked certain documents here, but I do offer to show through these documents, being three specific invitations from the State of Kentucky, that the State of Kentucky has continued to ask for f.o.b. destination bids since the issuance of the complaint in this case, and that this Respondent has continued to make its bids to the State of Kentucky on the basis requested, and that it continues to fill in the prices on its bids from the price cards contained in its files, and I have here—and were it not for Your Honor's ruling I would have marked as exhibits in

this card the price cards for these specific destinations involved.

Am I correct in understanding that this same ruling applies to this matter?

Trial Examiner Norwood: The same ruling applies. They are rejected, and it is not necessary to mark them—entirely unnecessary.

28950 Q. Well, would you just tell us for the record, Mr. Warren, how you fill in the prices on invitations from the State of Kentucky?

28951 Trial Examiner Norwood: He may tell us if he does it any differently in this case than he does in others. I think that is the shortest way out.

The objection is overruled. I think he may tell us.

Do you make those prices out in the same way as you do from the others?

The Witness: Yes, sir.

By Mr. Withrow:

Q. That is, from the price cards in your file?

A. Yes, sir.

Q. And to cut this as short as possible, Mr. Warren, in filling out other bids to other agencies besides the State of Ohio and the State of Kentucky, would you tell us whether or not you use any different method in filling out inquiries from other sources?

A. The same method.

Q. Have you ever had any requests from dealers to sell f.o.b. your mill?

A. No, sir.

Q. Have you ever had any invitations to bid from the Federal Government which specified f.o.b. mill bids?

A. Yes.

Q. Do you recall when this was, approximately?

28952 A. Well—1938.

Q. (Indicating) I show you Federal Trade Commission Exhibit 1339, and ask you if this is the first invitation for an f.o.b. mill bid that you recall?

A. Yes, sir; I think it is.

Q. And that is the so-called Good Friday bid?

A. Yes.

Q. Or invitation from the—

A. The Procurement Division, yes.

Q. Could you tell us whether or not the Osborn mill bid on this inquiry?

A. They did not bid.

Q. Could you tell us whether the El Paso or the Victorville mills bid on this inquiry?

A. Yes.

By Mr. Withrow:

Q. They did bid?

A. Both, yes.

Q. And you have that knowledge as an officer of
28953 the Southwestern Company?

A. Yes, sir.

Q. Why didn't you bid at Osborn on this April 15, 1938, invitation?

A. Well, it was a radical departure from our prevailing method of doing business, and it was confusing to me, and I was unable in the time limit for consideration to make up my mind that I wanted to do it.

Q. Did you know at the time, or prior to the opening of the bids, whether or not El Paso and Victorville had bid?

A. Prior to the opening?

Q. Yes.

A. Well, I wasn't sure that they bid but I knew that it was their intention to bid with certain conditions or reservations.

Q. In considering this problem, would you tell us whether or not you considered the effect of such an invitation on your dealers?

28954 A. The question of the dealer relation is a very important one in a matter of that kind, and was decidedly considered as revealing the desirability of making a bid on that invitation.

Q. Would you tell us whether or not there was any discussion between yourself and any of your dealer customers?

A. I talked to a few dealers, yes—or a few talked to me, I will put it that way.

Q. Can you recall—

Trial Examiner Norwood: Did you talk back?

The Witness: Talked back, yes.

By Mr. Withrow:

Q. Well, what was their attitude?

A. It created a great deal of wonder as to what the

future held as to the sale of cement for local projects, and the question was asked as to what we thought of it, where it was leading, and what would be the results. I couldn't say; I was bewildered myself.

Q. Well, could you tell us whether or not the dealers were opposed or in favor of this new departure?

A. Well, those that talked to me were decidedly opposed to it.

28955 Q. Well, Mr. Warren, to clear up the Examiner, —would you tell us whether the departure— Well, just tell us what this departure was?

A. Well, it consisted of a central agency in Washington proposing to buy the cement for a number of local agencies, all agencies, or nearly all, Government agencies engaged in construction work or relief work, and the departure was from a practice of these agencies buying locally or semi-locally in various sections of the country.

Q. So that the departure you refer to was not primarily concerned with the purchasing f.o.b. mill?

A. Primarily, it transferred the purchase and procurement of cement from the—you might say the trade, and the local agencies throughout the country, to a central bureau in Washington.

Q. Have you had any other such invitations from the Federal Government?

A. I believe there was one more limited in extent covering Ohio and West Virginia, I believe; it might have included a little more, but I remember it included Ohio and some outside—

Q. Did you bid on that invitation?

A. No, sir.

Q. Why didn't you bid?

A. Well, for the same reasons, and some ques-

28956 tion as to whether it was—whether the thing would go through, and whether the making of a bid would be embarrassing with our local trade relations.

Q. Well, have you found, since you have been with the Osborn mill, that it is the custom of the Government to ask for bids f.o.b. mill or f.o.b. destination?

A. Most of the contracts for which I have seen invitations have asked for f.o.b. destination or alternate bid,—destination or mill.

Q. Why don't you bid f.o.b. mill on U. S. Government business?

A. Well, we don't price our cement, we try to meet the market at the destination, the same with the Government prospect for business as for commercial.

Q. In other words, you try to meet the competition at the destination where the cement is to be used?

A. Yes, sir.

Q. Mr. Warren, do you feel that the Federal Government is entitled to any special price consideration?

A. No, I don't think they are.

Q. Now, since you have been at Osborn, have you found that the Federal Government is one of your largest customers?

A. No, it has been a relatively minor customer in percentage of our total shipments.

Q. Well, has there ever been a year since you have been at Osborn when the Government was—well, pur-
28957 chased a large percentage of your shipments?

A. No.

Q. Could you give us some idea of how your sales expense in connection with sales to the Federal Government compares with sales expense on commercial business?

28959 A. The attention given to solicitation and care for and servicing of such orders is carefully carried out, and requires as much attention—in some cases more and in some less—than our commercial activities; they are a little more demanding in some respects, and I can illustrate that in a variety of ways; but it is an exacting customer which receives exacting attention.

By Mr. Withrow:

Q. How do you find the requirements for serving Government jobs compares with the requirements of serving ordinary commercial jobs, which you sell to the dealer or contractor?

Trial Examiner Norwood: I want you to tell us fully about the difference in expense between selling the Government and selling the various customers, selling the Government in large quantities, and other customers in small quantities.

28960 A. They receive the best of our attention, which is as good, if not better, than any attention given to commercial jobs.

Trial Examiner Norwood: I was asking you to state a

fact, which you might recall without any further questioning, that would show us the difference between selling the Government and selling these dealers.

Mr. Withrow: Maybe we could get at it, Your Honor, by asking what special functions you perform for the Government after you have made a sale to the Federal Government?

The Witness: Most anything that the engineer in charge wants within the limits of advice and consultation
28961 on his material, such as his method of sampling and testing the concrete.

By Mr. Withrow:

Q. Mr. Warren, would you tell us whether or not it is a fact that the Government pays cash promptly?

A. Sometimes promptly and sometimes not.

Q. Well, would you give us an idea of what percentage of your dealers and contractors take advantage of the cash discount you offer?

A. Well, ever since 1933 it has exceeded 90 percent.

Q. Are there any specific expenses which you can recall to mind in connection with sales to the Government which you did not incur in ordinary commercial business?

A. Well, they are very similar except the participation in the program of tests, or something of that kind, that some Government department is interested in.

Q. Well, do you have any bond premiums in the case of commercial business?

A. Yes, sir.

Q. So that on that basis it compares with the same?

A. Some commercial business has bond requirements and a great deal does not.

Trial Examiner Norwood: You need not discuss those things that are common to both.

By Mr. Withrow:

28962 Q. But all Government business is bond business?

A. Yes, sir.

Q. Now, Mr. Warren, when you post prices in your books of account, do you at Osborn post the destination price figure or just the mill net figure?

A. We post the destination price and the freight allowance, and, therefore, to answer your question, both.

Q. Do you regularly prepay freight, or does the buyer pay freight?

A. We regularly prepay freight to stations which do not have freight agents, and to Federal and State Governments, but not to the rest of our customers.

Q. And why don't you prepay freight to the rest of your customers?

A. Well, in the first place it takes too much money to pay the freight for an activity that we can get the customer to assume. It would raise our accounts receivable without any corresponding value to us.

Q. And when the buyer pays the freignt in these cases where he does, does he pay it for his own account or for your account?

A. He pays it for our account, but it amounts to a substantial payment on his cement bill and reduces the amount on the books that he has to pay later.

Trial Examiner Norwood: Isn't the bill in his name?

28963 The Witness: The car is billed to him; yes, sir.

Trial Examiner Norwood: How is he paying it to your account?

The Witness: Well, we sold him at destination and shipped freight allowed.

Trial Examiner Norwood: Doesn't he pay it out of his own account, deduct it?

The Witness: Sir?

Trial Examiner Norwood: Doesn't he pay it out of his own account and deduct it?

The Witness: Well, that perhaps is his view of it, but my view of it is he pays for our account and frequently sends us his receipted bill in part payment for his cement.

By Mr. Withrow:

Q. I believe you said you prepaid shipments to the United States Government. Would the same apply to State and county work?

A. Yes, sir.

The witness identified Resp. Ex. 1705 as an in-
28964 voice for the sale of cement being used for a number of years prior to July, 1937.

Q. Would you just tell us what an invoice shows when it is filled in?

A. It shows the name of the customer and his address, the date of the shipment, the point or the destination of the

car itself, the car number, the amount of the product sold, the destination price and the gross and the terms and the amount of discount.

Q. Does it ever indicate any basing point or price bases?

A. No.

Q. It never shows that?

A. No, sir.

Q. And is that the invoice form which you now employ at Osborn?

A. Yes, sir.

Q. Do you keep a duplicate of this invoice in your file?

A. Yes.

28968 (RESP. EX. 1705 was offered and received in evidence.)

Mr. MacIntyre: Now, do we want it understood that this is in—that this is not an invoice showing an actual transaction, or is it received for showing such, or just what is it, or is it received for showing the form of invoice?

Trial Examiner Norwood: It is received for the form, as I understand it.

Mr. Withrow: And the manner in which it is filled in, if that is all right.

Trial Examiner Norwood: Yes.

28969 By Mr. Withrow:

Q. I do not recall, Mr. Warren, whether you said whether or not buyers sometimes sent in the receipted freight bill.

A. Yes, sir.

28970 Q. Has your company ever had occasion to discuss the question of prepaying freight with its dealers, customers?

A. Yes, sir.

Q. And what position have these customers taken?

A. Most of them are satisfied with it. We have very little dissension over it. In fact, I do not believe we ever lost a customer as a result of it.

Q. Now, Mr. Warren, will you tell us when you make bids to the United States Government from the Osborn mill whether or not you quote them the going commercial price or some special price?

A. Well, the few bids that we have made, in my experience we have quoted our commercial price at the destination of the work.

Q. And during the Code, how did you determine what prices you would quote?

A. Quoted the prices that we had filed with the Code Authority of the cement industry under the N.R.A.

28971 Q. The prices filed with the N.R.A. Code Authority?

A. Every price, every destination price was filed and we retained a copy of that filing, and made our prices by selecting them from that price list.

Q. Mr. Warren, are there any land-grant rates in the territory where you market cement?

A. No.

Q. Have you ever used a so-called control clause in computing Government business from the Osborn mill?

A. No, sir.

Q. Have you ever qualified to bid with such a control clause?

A. No, sir.

Q. Since you have been at Osborn have you ever requested the withdrawal of a bid made to the Federal Government?

A. No, sir.

Q. And would you tell us whether or not you ever made any sort of—or ever had any sort of agreement or understanding with your competitors as to what price you should bid to the Federal Government?

A. I have not.

28982 Q. Did you ever bid on the Tygart River reservoir dam, Mr. Warren?

A. Yes, sir.

Q. I would like to show you Federal Trade Commission Exhibit 178-A and ask you if this is the occasion on which you bid (indicating)?

A. Yes, sir; it is.

Q. And was the opening date on that bid January 18, 1935?

A. Yes, sir.

Q. How much did you bid?

A. $1.84 a barrel.

Q. Do you know about what the commercial price was at Grafton, W. Va., in January of 1935?

A. It was somewhat higher than that, over $2, I think $2 and a few cents.

Q. So this was about 20 cents below the commercial price?

A. That's my recollection; yes, sir.

28983 The witness identified Resp. Exs. 1712 through 1716 as a copy of Southwestern's bid and bond on the Tygart River Reservoir project in 1935 and correspondence pertaining to it.

28985 (RESP. EXS. 1712, 1713-A to 1713-N, 1714, 1715-A, 1715-B, and 1716 were offered and received in evidence.)

The witness identified Resp. Ex. 1717 as a notice from the Code Authority of the Portland Cement Insti-

28986 tute to Southwestern stating prices filed for the Tygart River Reservoir Project; Resp. Ex. 1718 as a similar notice from the Code Authority of the Portland Cement Industry to Southwestern and other companies, concerning the Tygart River Reservoir Project; Resp. Ex. 1719 as a telegram from the Code Authority to his company notifying it of a price filed on the Tygart River Reservoir Project; Resp. Ex. 1720 A and B as a copy of a price filing by his company with the Code Authority for the Tygart River Reservoir Project. The handwriting in the left-hand margin is that of Mr. Noland.

The witness identified Resp. Ex. 1721 A and B as a notice from the Code Authority to his company concerning changes in prices filed for the Tygart River Project; Resp. Ex. 1722 as a request by his company to the United States Engineer's Office at Pittsburgh to receive notices of calls for bids on the Tygart River Project. The handwriting appearing on the face of the document is that of

28987 Mr. Noland. The information contained in Resp. Exs. 1717 to 1722 is that which witness had concerning the Tygart River Reservoir Dam at the time he made his bid and this is the information on which he, in fact, did make his bid. These documents enabled Southwestern to bid on the Tygart Dam because the prices on file with the Code Authority were transmitted to Southwestern by the Code Authority so that it was able to know in advance of the letting what prices had been filed for that project. He found that out in time to file his bid at the same figure. Southwestern obtained this information in connection with each of the three requests concerning the Tygart River Dam.

28990 (RESP. EXS. 1717, 1718, 1719, 1720-A, 1720-B, 1721-A, 1721-B, and 1722 were offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Warren, if I recall your testimony correctly about your normal marketing area, this dam is located outside that normal area, is it not?

A. Yes.

Q. Well, how did you first learn of the existence of this project since it was outside your normal area?

A. Through an advertisement.

Q. And is that the thing referred to in Respondents' Exhibit 1722?

A. That clipping is from a publication, advertisement on the part of the U. S. Engineer's office concerning it.

Q. Could you tell us why you bid on the Tygart River Dam if it is outside your normal marketing area?

A. There was very little prospective business closer and we were badly in need of some business. Our mill was shut down and we were anxious to get some tonnage to start operating. Our men were unemployed and were inquiring from day to day as to when we could start up.

28991 Q. Was there any other Government work closer to the mill than Osborn at that time?

A. None of any consequence,—of any volume.

Q. Now, was your bid on this first invitation accepted or rejected or thrown out, or what?

A. Rejected.

Q. Now, did you bid on the re-advertisement of the Tygart River project?

A. There were two re-advertisements, as I recall.

Q. Well, did you bid on either?

A. Bid on—no, we did not bid on the last inquiry.

Q. And could you tell us why you did not bid on the last inquiry?

A. Well, the price filed for the project was so low that I did not care to undertake to get the business.

Q. Would you examine Exhibit 178-B and tell us if this is the last—Commission's Exhibit 178-B—and tell us if this is the last inquiry to which you refer?

A. Yes, sir.

Q. And the price bid there by your competitors was $1.70, wasn't it?

A. Yes, sir.

Q. And did you know that—I believe you testified that you knew that price in advance?

A. We received notice from the Code Authority
18992 of the price filed.
28993 Q. (Indicating.) I show you Commission's Exhibit 1063, which shows you received an invitation in Mississippi.

Do you recall the invitation, and, if you, do, would you tell us whether or not you bid?

A. We did not bid.

Q. Why didn't you bid?

A. Well, that is too far away.

28996 Q. Mr. Warren, in connection with these several bids to the United States Government, where you did not bid—I think it was the Tygart River Reservoir, the Good Friday bids—there was this invitation 1394, there was this job down in Mississippi, Commission's Exhibit 1063. Would you tell us whether or not you agreed with any of your competitors not to bid in these instances?

A. I did not.

29015 Q. Mr. Warren, do you recall a bid at Dam No. 35 on the Ohio River during August, 1935?

A. Yes, sir.

The witness identified Resp. Exs. 1735 through 1738A to C as a copy of Southwestern's bids and tabulation of bids on United States Engineer's Office contract, open-
29016 ing July 1935; Resp. Ex. 1734 as a copy of a letter from Southwestern's sales department to the Chairman of the Trade Practice Committee of the Institute, concerning its bid on Dam 35 of the Ohio River. He was in general charge of the bid by Southwestern at this time and this transaction was handled under his general supervision.

29019 (RESP. EXS. 1734, 1735, 1736, 1737-A to 1737-K, 1738-A, 1738-B, 1738-C" were offered and received in evidence.)

By Mr. Withrow:

29020 Q. Mr. Warren, I show you a photostatic copy of Commission's Exhibit 373-A, and ask you if this refreshes your recollection as to whether or not you bid on a letting of the Department of Justice at Chillicothe, Ohio, on June 12, 1936 (showing document to witness)?

A. Yes, sir.

The witness identified Resp. Exs. 1739 A, B and C, 1740 and 1741 as a copy of Southwestern's bid to the U. S. In-

dustrial Reformatory at Chillicothe in June 1936; a letter accompanying it to the officer at that institution; and a memorandum to Southwestern's salesman traveling that territory. Southwestern's bid to the reformatory at Chillicothe was prepared under his supervision.

29021 (RESP. EXS. 1739-A, 1739-B, 1739-C, 1740, 1741 were offered and received in evidence.)

The witness identified Resp. Ex. 1742 as a copy of an invoice on a shipment of cement made by his company to a customer at Chillicothe, Ohio, in June 1936; Resp. Ex. 1743 A and B as a price card from Southwestern's files for Chillicothe, Ohio.

By Mr. Withrow:

Q. I want to know, Mr. Warren, whether or not you bid a special price, or your going commercial price to
29023 the U. S. Industrial Reformatory on your bid of June 6, 1936?

A. We bid the same price that we were selling cement for in Chillicothe.

Trial Examiner Norwood: In other words, the bid carries the same price as this invoice here to a dealer?

The Witness: Yes.

29031 (RESP. EXS. 1742, 1743-A, 1743-B were offered and received in evidence.)

29034 Trial Examiner Norwood: Well, wait a moment. He is asking you for some factual matter there. He is not asking you for theory.

Now, base your answer on experience.

Mr. MacIntyre: What is his answer? May we have it read?

Trial Examiner Norwood: What has it done, and if it has changed, tell us what it did, and so forth.

The Witness: Well, my experience—

Mr. MacIntyre: Just a moment.

29035 May we have that last answer of his read back?

Mr. Leisure: There is a question pending by the Examiner.

Mr. MacIntyre: I am asking him if we may have the answer read back that he has already given.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I haven't had a chance yet to make any comment on it, if it need be.

Trial Examiner Norwood: Read it.

(Last answer read by Reporter.)

Mr. MacIntyre: I move to strike that answer, if Your Honor please, and then have the witness to testify as to any facts.

Trial Examiner Norwood: The motion is allowed.

By Mr. Withrow:

Q. Well, would you tell us, Mr. Warren—either answer the Examiner's question, or just tell us what your experience has been as a seller of cement?

A. My experience has been that there can be only one price for standard Portland cement, a known price, or a public price in a given market at a given time.

Q. Would you tell us whether or not you have ever known a time when there were two effective published prices on cement in the same market at the same time?

A. No, sir.

29036 Q. Would you tell us why you don't attempt to maintain a price different from the market price?

A. The customer will buy at the lowest price offered.

Q. Do you find, Mr. Warren, that different brands of standard Portland cement vary, or are they the same?

A. They vary; no two that I know of are exactly alike. The variations are in minor matters, minor factors, or qualities, properties.

Q. Are any of these variations that you have run into—are any of them fundamental?

A. No.

29037 Trial Examiner Norwood: Can you give us the details of these variations of the various kinds of cement?

The Witness: I am very well informed on that.

Trial Examiner Norwood: You are? Then go ahead.

A. The variations are slight, and do not affect the engineering design, or the requirements of contracts in specifications, variations in color, minor variations in workability, differences in the fineness, which are caused in any standard brand, or another, for certain specific or special uses.

By Mr. Withrow:

Q. Well, in your experience, have you ever found any customer that was willing to pay a penny more for one of these different cements than others?

A. No, the preferences generally do not go to willingness to pay a higher price for one as against another.

Q. Mr. Warren, will you tell me whether or not the Southwestern Company has an agreement or understanding with any competing cement producers to maintain its present method of pricing cement?

A. No, sir; we have not.

29042 Q. Mr. Warren, in your experience in the sale of
29043 cement, or in connection with Portland cement, would you tell us whether or not you found any improvements in the standard of Portland cement?

A. Yes, the improvements have been made from year to year, and from time to time, over a long period of time.

Trial Examiner Norwood: I want to ask the witness: Do you find in your business sales competition as between you and other manufacturers?

The Witness: Yes, sir.

Trial Examiner Norwood: Do you find in your business price competition as between you and other manufacturers?

The Witness: Yes, sir.

By Mr. Withrow:

Q. Could you tell us, just briefly, what type of improvements have been made in standard Portland cement over a period of years?

A. What type of improvements?

Q. Yes.

A. The requirements of the standard specifications first adopted in 1904 by the American Society for Testing Materials have been changed, in major particulars, seven or eight times since that period, and the methods of test have been under constant improvement, testing procedure
29044 has been improved from year to year; the strengths are much higher than they were a few years ago; the fineness requirements on most work are considerably higher; higher standards of quality, better preparation of raw materials, better burning in the product, and finer grinding of the finished product, with greater uniformity and greater exactness in the testing.

Q. Now, in your answer, Mr. Warren, you mentioned the A. S. T. M. Would you tell the Examiner what that stands for, and just, generally, who are members of that organization?

29045 A. I am a member of the Cement Specifications

Committee of the American Society of Testing Materials, and have been for several years, and that committee, as all other committees of the American Society of Testing Materials, is made up of representatives from producers of engineering materials, consumers, and neutral or scientific interests, including the various Federal Government bureaus.

By Mr. Withrow:

Q. And do the representatives of cement-producing companies have a majority on the Committee C-1?

29047 A. The producers are required by the rules of the Society to be in the minority, and they are in the Cement Committee.

By Mr. Withrow:

Q. Who votes on a change in specifications for Portland cement?

A. The producers, consumers, and the neutral or scientific interests.

Q. Does the whole membership of the A. S. T. M. pass on the specifications?

A. The Committee first passes on them, and then the specification is subject to letter ballot, so that those not attending the meeting—and that letter ballot goes to the entire membership of the Society.

Q. And the cement manufacturers, would they represent a majority of the entire membership, or a small—

A. No, there are several thousand members of the Society, engineers, technicians, manufacturers.

29049 Q. How do you find the prices, Mr. Warren?

Trial Examiner Norwood: You mean with regard to being profitable?

Mr. Withrow: With regard—

Trial Examiner Norwood: Or being competitive, or what?

Mr. Withrow: With regard to whether they are satisfactory to him as a vice-president of the Southwestern Portland Cement Company.

A. Our prices are too low, in my opinion.

29062 By Mr. Withrow:

Q. Mr. Warren, do you know of any inefficient mills in the cement industry?

A. No. Because a plant is old does not mean it is in-

efficient. We have a plant at El Paso that was built, started building in 1907, and finished, started shipping in 1909, and we believe it is very modern and efficient.

Trial Examiner Norwood: Now, you give us the facts in regard to your mill upon which we might base some conclusion as to whether or not it is efficient; that is, what do you—

29063 The Witness: As to how I know?

Trial Examiner Norwood: What do you understand by an efficient mill—what are the qualities it possesses?

The Witness: I will make that as brief as I can.

We are not striving for the lowest man-hours per barrel. There are one or two pieces of equipment which we could install which would save us a little labor, which we have not decided to do. It would not improve our quality or our output, and those are coal grinding mills, preparing coal for iron. I have tested that by inviting bids by each and every one of the producers of newer and more modern coal-grinding equipment, asked them "What could your equipment save for us? What will it cost? How soon could we get it installed?" and each and every one has said, "We can't aid in your burning operations, we can't use less B. T. U. per barrel of cement. We might save you a little labor, won't save you any power." Those are the principal factors, heat, labor, and power.

Now, as to our kiln operation, which is the heart center around which a cement plant is built, there I have asked for the same advice from technicians in the trade who sell and erect manufacturing equipment, as to whether or not they know how we could improve that, whether our output and our fuel per barrel of cement used compares favorably with the best that they know of. It is not the ab-

29064 solutely lowest, but it compares favorably, they told me, with the better and newer plant, and told me we are doing a lot better than some plants who have built since.

As to the quarry operation, which is an important factor: There we have spread out the work, and we do not have the most efficient crew. I would rather two shifts a day, and every week, but the quarry operation is very efficiently done, and not inefficient, and any inefficiency in the cost of quarrying is because of our giving men straight time and finding work for them to do to fill out the week's work,

when we are manufacturing less than a week's shift in quarry would provide.

Trial Examiner Norwood: Well, I think that the efficiency that is involved in this case means the ability of a mill to turn out cement at the least cost to manufacture. Now, how does your mill compare with that?

The Witness: That comparison would have to take into account fuel and labor rates, and many of those things.

Trial Examiner Norwood: How does it compare with other mills in that regard?

The Witness: With mills that I know, it compares favorably; not the lowest, not the highest, but in the lower range.

By Mr. Withrow:

29065 Q. Mr. Warren, would you tell us whether or not you have done anything to maintain any inefficient mills in operation?

A. No, sir.

Q. Mr. Warren, have you ever considered the effect—hat the effect would be on the Osborn mill if you sold all your cement on a flat f.o.b. mill price?

29066 The Witness: Yes, I have given that serious thought.

By Mr. Withrow:

Q. Now, what was your reason for not quoting that way?

A. The customers do not ask for it.

Q. Are there any additional reasons?

A. You want to meet the competitor at the market where people want cement.

Q. In considering this problem, would you tell us
29067 whether or not you took into consideration the location of your plant and the freight rate from your plant in comparison with other mills?

29068 The Witness: Yes.

Q. Will you tell us, Mr. Warren, what the facts
29069 are about this problem of freight rates, comparison between your mill and other mills?

A. Mills are located in the belt around us, and at all borders of our territory they reach in for a distance and demand is a very changeable thing, and we feel that we must cover quite a broad territory to secure business. There are many, many people soliciting in the same place.

Q. Do you know in what area, territory, you have a freight advantage over other mills excluding, for the time being, the Wabash mill, which is located at the same point?
A. Yes.

By Mr. Withrow:

Q. Well, what is this territory?
29070 A. It is a narrow belt around our mill, extends—Now, did you say excepting the Wabash mill?
Q. Yes.
A. No advantage there. But with other mills, 50 to 60 miles to the east, about the same to the south, and a little more to the west, perhaps 60 or 65 miles to the north.
Q. Mr. Warren, do you sell to everyone who holds himself out to be a building supply dealer?
A. No, sir.
Q. How do you determine to whom you will sell as a dealer and to whom you will not sell?
A. We investigate the man or the firm in question as to his ability to store and handle, deliver to users our product, and generally other building materials.
Q. Well, do you have a strict definition of what constitutes a dealer? Do you or don't you?
29071 A. Yes.
Q. And do you ever make any exceptions from your definition?
A. Oh, yes. There are exceptions.
Q. Well, will you just state under what circumstances you make an exception.
A. In sparsely settled localities where there is some demand for cement, but small, a man less well equipped is sometimes sold where he would not be in a market where a number of brands were sold; would not consider him aggressive enough or perhaps have enough credit to handle a large volume of business.
Q. And are you selling to any such individuals at the present time?
A. Yes. We have quite a few in the sparse sections of southeastern Ohio and portions of Kentucky and Southern Indiana.
Q. Would you tell us, Mr. Warren, whether or not you have any requirement that one of your dealers, in order to be sold as a dealer by your company, must belong to a dealer association?

A. No, sir.

Q. Have dealer organizations written and asked you not to sell to individual dealers?

A. Yes. We have had such requests.

Q. And would you tell us whether or not you made any replies to these requests?

29072 A. I have never replied to one of them.

Q. And would you tell us whether or not you continued to sell any dealer after such a protest?

The Witness: I would not and I never have discontinued selling any one for that reason.

Q. Have you found, Mr. Warren, that your competitors were selling to dealers whom you did not consider adequate dealers for the Southwestern Company?

A. Yes, I have experienced that.

Q. And could you tell us why you would not sell them if your competitors would?

A. Yes, sir; I would be willing to tell that.

Q. Would you go ahead and tell us what the facts are?

A. We are anxious to get our cement into the hands of the users. A large portion of our cement, considerably more than half, is used by the less-than-carload user, and it is a highly perishable commodity, and there are some people who handle cement that I would not want to handle ours. If they do not warehouse properly it will deteriorate, and the customer will get an inferior product. It begins to deteriorate the minute it is exposed to moisture, the moist air, and of course there are many cases of people who can buy from someone who we do not

29073 consider a proper credit risk, and there are others to whom we do not sell because we feel we have adequate representation in certain localities.

Q. Mr. Warren, would you tell us whether or not the Southwestern Company has ever agreed with its competitors to limit sales to dealers in accordance with any definition?

A. We have not.

Q. And will you tell us whether or not a dealer is a necessary part of your distributing system?

A. We so consider it.

Q. And why do you consider it? What are the facts?

A. It is based largely on my previous answer that there is so much business to be had in small quantities, requiring

it to be stored, and we want it in stock in as many towns as we can so that the occasional user can go down town or somewhere and get some of our product.

Q. Could you undertake the function which the dealer performs?

A. Could we?

Q. Yes.

A. Well, we could, if we had the resources enough to supply warehouses and men to man them, and equipment to deliver, but it would not be a practical thing.

Q. Do you sell all of your cement through dealers?

A. No.

29074 Q. Well, under what circumstances—I mean, what cement do you sell through a dealer and what cement do you sell in other ways?

A. We would sell practically everything to dealers excepting United States Government, State Governments, railroads, and ready-mix concrete plants, large product plants, concrete product plants who buy it for their own use in making products of various kinds.

Q. And what criterion do you use, if any, to determine when you will sell to a dealer or when you will sell direct to some purchaser?

A. Well, if the work in question falls in those classes that I have enumerated, we will sell it direct, but all other classes of business we sell to or through the building material dealer. That includes, of course, the lumber dealer.

Q. Now, who determines that classification?

A. Who determines it?

Q. Yes.

A. I do.

Q. And could you tell us what the basis was for making that classification?

A. Well, that substantially was what I found when I came to the company, and it follows practically the classifications which were established in the Code of Fair Trade Practices under the N. R. A.

29075 Q. And when you say "established by the N. R. A. Code," are you referring to Article XI?

A. Article XI of that Code, enumerated the classifications of the customer.

Q. How do you sell cement for W. P. A. projects?

A. We don't sell very much, but we sell partly to dealers and some small quantities we have sold direct.

Q. How do you determine which W. P. A. projects to sell direct and which to sell through dealers?

A. Well, I prefer to sell through dealers where I can, but where competitive conditions will permit I bid on some work direct, and have gotten a small quantity.

Q. Was there ever a time when you sold all your W. P. A. projects through dealers?

A. Yes, sir.

Q. And when did you change?

A. Some time last year we made our first bids on W. P. A. work.

Q. Will you just tell us briefly the facts surrounding this change in policy?

A. Well, the W. P. A. took bids in Ohio at three or four of the principal cities,—five, I believe, to be exact—in large quantities, and I did not bid on that work because we had notified our customers—our dealers—that that was work that they participated in, and I felt that it should go
29076 through the regular channels of trade distribution, and maintained that position for several months; but a number of dealers suggested that we might as well waive that consideration, they were not getting the business, and they had no objection to our bidding if we saw fit. Very little has been bought in Ohio since that time.

29077 Q. Well, was there any agreement with your competitors to bid direct on, or bid through dealers on W. P. A. business?

A. No, sir.

Q. And, just to sum up the situation, you found competing companies selling direct, and finally, then, you decided to sell some of your W. P. A. business direct?

A. Yes, sir.

29078 Q. But you still do not sell all of it direct, but sell some through dealers?

A. Some through dealers, yes.

Q. I believe you stated that you preferred to sell W. P. A. work through dealers. Would you tell us why you prefer to sell it through dealers?

A. I did testify as to why I did not bid on a large inquiry. Well, I believe that the W. P. A. has destroyed, and is destroying an important element in the construction industry; namely, many of the small builders, small municipal

contractors, and others who have equipment and em-
29079 ploy local labor in construction activity of all kinds.

We have depended on that class of business largely to build up our business, and it has been my belief that the relief methods of purchasing were temporary, and they were for relief, and that the greater benefits would flow if those people were not destroyed, and that work were allowed to follow the regular commercial channels.

The witness identified Resp. Ex. 1745 as a copy of Southwestern's announcement of its sales policy to its customers; Resp. Ex. 1744 as a letter to Southwestern's salesmen transmitting the copy and explaining what it is.
29080 The policy was issued on February 23, 1935, and the letter transmitting it bore the same date. It was sent out under his supervision. The handwriting on Resp. Ex. 1744 is Mr. Noland's, the author of this letter.

Examination on Voir Dire by Mr. MacIntyre.

Q. This was printed and sent out to the trade when (indicating)?

A. In February of 1935.

Q. Was it sent out to the trade as "Exhibit 8-A," or what is that?

29081 A. Oh, I can't recognize that.

Q. Sent to all of your dealers?

A. Yes.

Q. What does this mean (showing to witness Respondents' Exhibits 1744 and 1745)?

A. Well, it is merely a letter transmitting a copy of this to our salesmen so that they will know—

Q. Showing them what was sent to the trade?

A. What was sent to the trade; yes.

Q. Does it serve any purpose as a record of your company?

A. Well, it doesn't to me; no, sir.

Q. Well, do you know of any other purpose it serves?

A. No, I don't; no, sir.

(RESP. EXS. 1744 and 1745 were offered and received in evidence.)

29082 By Mr. Withrow:

Q. Mr. Warren, would you tell us whether or not you sometimes vary your classification business?

A. Yes, there have been variations.

Q. And who decides when such variations should be made?

A. I do.

Q. Could you tell us why you sent out this policy, Respondents' Exhibit 1745?

A. Due to the confusion among our customers, and the many inquiries as to what our sales policy was, or was likely to be following the stay of the Article XI of the N.R.A. Code, which itself was contested by many
29083 people, many dealers did not like that, and many felt that they would come off worse in the absence of it—we were beseiged with inquiries as to what our practice would be.

Q. Did any other companies make announcements about that time?

A. Yes, sir.

Q. And did this have anything to do with your decision to send out an announcement.

A. Yes, it did.

The witness identified Resp. Ex. 1746 as an an-
29084 nouncement of the Lehigh Company, "the handwriting addressed to H. W. Noland, in pen, F. F. V.", Bessemer's salesman at that time in Columbus; Resp. Ex. 1747 as an announcement of the Lehigh Company, February 20, 1935. The handwriting is that of Mr. Noland who lives in Tip City, Ohio and wrote Miami Coal & Coke Company, Tip City, Ohio. He identified Resp. Ex. 1748 as an announcement to the trade of the Universal Atlas Cement Company, with the same marking as Resp. Ex. 1747 by Mr. Noland; Resp. Ex. 1749 as an announcement by Universal Atlas with no notations; Resp. Ex. 1750-A as an announcement of the Lone Star Company, initialed by Mr. Noland, marked "Received from L. L. Wilson" who was company salesman at Lima, Ohio; Resp. Ex. 1750-B as a continuation, the second page of the Lone Star announcement; Resp. Ex. 1751 as an announcement of the Diamond Portland Cement Company; the handwriting is Mr. Noland's; Resp. Ex. 1752 as an announcement of the Standard Portland Cement Company; the writing is Mr. Noland's; Resp. Ex. 1753 as an announcement of the Wabash Portland Cement Company; the handwriting is Mr. Noland's; Resp. Ex. 1754 as an announcement of the Columbia Cement Division of the Pittsburgh

Plate Glass Co.; the handwriting and the initials of
29085 Mr. Noland; Resp. Exs. 1755 and 1756 as an announcement of Wolverine Portland Cement Co.; the handwriting is that of Mr. Noland.

These documents came to the witness' attention. The receipt stamp which appears on some of these documents was placed there in his office. Similar announcement had come to his attention at the time he issued his sales policy, being Resp. Ex. 1745. These announcements were picked up by his salesmen in the field because the announcements excited a great deal of interest and approval by their customers. His salesmen wanted to know what the company's policy would be and whether the company intended to send out an announcement.

29094 By Mr. Withrow:

Q. Mr. Warren, I would like to direct your attention to the matter which Mr. Paulson raised, and ask you whether or not prior to announcing your sales policy which is marked Respondents' Exhibit 1745, whether
29095 or not you agreed with any of your competitors to adopt and announce that policy?

A. I did not.

Q. Is this February policy of yours the latest policy—the latest announcement of policy—which you—

A. No, there was a later one. I think in April of the same year.

The witness identified Resp. Exs. 1757 and 1758
29096 as an announcement of the policy issued to the company's entire trade on April 22, 1935, and
29097 the letter to their salesmen transmitting that copy.

He was familiar with this announcement at the time it was prepared. He supervised it and decided that it was to be sent out.

This announcement supplanted the other one that was in effect at that time.

By Mr. Withrow:

Q. Why did you send it out in April, 1935?

A. I wanted to match other announcements that had been made more favorable to dealers.

29098 (RESP. EXS. 1757 and 1758 were offered and received in evidence.)

By Mr. Withrow:

Q. How did you know that competitors had sent out other policies?

A. In the same way: we found them in the customers' hands.

Q. Did your salesmen pick these announcements up?

A. The salesmen picked them up and sent them to us.

Q. Mr. Warren, would you take these exhibits, Respondents' Exhibits 1759 through 1771-A, B, and go through them the same way you did before and tell us what each one of them is, and, if any of them have any handwriting on them, tell us whose handwriting it is (handing documents to witness)?

A. 1759-A, B, announcement of the Lehigh Port-
29099 land Cement Company.

1760, of the Universal-Atlas Cement Company—

Trial Examiner Norwood (interposing). Now, are they all announcements of cement companies which you followed when you changed your policy as per Respondents' Exhibits 1757 and 1758?

The Witness: Yes, sir.

By Mr. Withrow:

Q. And are these from your files?

A. They are from our files.

Q. And did these papers ever come to your attention?

A. Yes, sir.

Trial Examiner Norwood: Picked up in the field in the same way the others were?

The Witness: In the same way; yes, sir.

By Mr. Withrow:

Q. And did you act on them in the same way in which you did on Respondents' Exhibits 1746 through 1756?

A. Yes, sir.

29101 (RESP. EXS. 1746, 1747, 1748, 1749, 1750-A, 1750-B, 1751, 1752, 1753, 1754, 1755, and 1756 were offered and received in evidence.)

(RESP. EXS. 1759-A, 1759-B, 1760, 1761-A, 1761-B, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, and 1771-A and 1771-B were offered and received in evidence.)

29102 New York, N. Y.,
December 15, 1939.

29103 GEORGE E. WARREN thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow (Continued).

Q. (Handing to witness Respondents' Exhibit 1758) Mr. Warren, when we closed last night we were talking about Respondents' Exhibit 1758. Would you tell us whether or not you adopted that April 22, 1935, sales policy as a result of any agreement with your competitors?

A. I did not.

Q. And would you tell us whether or not, to your knowledge, you received direct from your competitors, or your salesmen received direct from your competitors, copies of their announcements in April, 1935?

A. We did not.

29104 Q. Now, to whom did you send these February and April, 1935, policies?

A. To all of our dealers, and to each of our salesmen.

Q. Now, when you say "to all of" your dealers, does that include all of the dealers in the territory where you market?

A. Well, all the dealers that we sell or solicit in all of the territory where we market.

Q. Would you tell us whether or not it has been the practice of your company to pick up announcements of the marketing policies of your competitors?

A. It has.

Q. How long has that practice been in existence?

A. Well, it has been as far back as I know anything about it.

29108 Q. Mr. Warren, as I recall your testimony yesterday, you stated that on certain occasions you departed, or made variations from, these announced policies of yours; is that correct?

A. Yes, sir.

Q. And was the W. P. A. an instance of this departure?

A. That is an instance.

Q. Why haven't you corrected your announcement with reference to sales to the W. P. A.?

A. Well, we have—that has affected very few of our dealers, and there have been very few localities affected, and I haven't any way of knowing whether that change would be continuous. I would like to fall back to the policy in all cases, if I could; though I haven't felt it was necessary to circularize our entire trade.

Q. Could you state for the record what percentage of the sales of your cement you sell direct to dealers and what percent you sell to contractors?

A. About 80 percent to dealers, and something
29109 less than the balance to contractors.

Q. Do you ever have requests from large purchasers or contractors for the right to buy direct on business you normally sell through your dealers?

A. Yes, we occasionally have that.

Q. Are you willing to make any carload sale of cement direct to a consumer?

A. No.

Q. Would you tell us why you are not willing to make all sales in carload lots direct?

A. Well, on work where the dealer renders the service to us, or the customer, or both, we believe that it is properly sold through the dealer.

Q. When this situation arose, have you ever attempted to explain your position to the would-be purchaser?

Q. Would you just take a specific instance and tell the Examiner exactly what the transaction was, and what your explanation was to the person who wanted to purchase direct?

A. Why, I take the illustration of the utility pur-
29110 chasing agent, city utility, who came to visit our plant, and accompanied the dealer from whom he had been buying our cement. During his visit he asked me why he, being a frequent carload user, could not purchase his cement directly, rather than to have to pay a mark-up to a dealer, and I explained to him our reasoning on that, and I believe he was satisfied.

Q. Mr. Warren, would you just expand a little bit and tell us what you told this purchaser?

A. I told him that there were many instances in our

sales transactions where we were in no doubt as to the desirability of selling it direct to the user; and on the other side, there were many where we were in doubt over the desirability of selling through dealers—that there were instances that were more difficult to decide; that we
29111 could not in all cases, at all times, be sure we were correct in that division of customers,—that perhaps he was right in thinking that his business fell in that class,—but I questioned him as to his purchases over the year, and from year to year,—he told me that he frequently bought—.

29112 A. (Continuing) —to protect our dealer and our sales and service in his town, to assure the proper delivery of our goods, the collection of our bills, and the service to the customer from contact with the dealer, we preferred to sell it that way.

By Mr. Withrow:

Q. Could you tell us, Mr. Warren, whether after this conversation this purchaser bought Miami cement through one of your dealers?

A. Yes, sir.

Q. Do you know what the dealer's mark-up was on the subsequent sale to this purchaser?

29113 A. No, sir.

29117 The witness identified Resp. Ex. 1775-A as a letter from Mr. Noland to all their salesmen, prepared under witness' supervision and pursuant to his instructions.

29119 (RESP. EX. 1775-A and 1775-B was offered and received in evidence.)

291.0 By Mr. Withrow:

Q. Mr. Warren, have you had any problems with respect to diversion of shipments in transit?

A. A few.

Q. Would you tell us how such a diversion is accomplished?

A. The customer, in the cases that I know of, ordered cement shipped to his location, and after receiving the car numbers ordered the railroad to reconsign the shipment to another town.

Q. Well, how does the dealer or purchaser get the car number before he gets the car of cement?

A. They are sent to him from our office.

Q. As a part of the invoice?
A. Yes, sir.
Q. What is the policy of your Osborn mill with reference to this diversion of shipments in transit?
A. We are opposed to it.
Q. Could you tell us, briefly, why you are opposed to it?
A. It is a--an order is a contract; an order is placed for a shipment to a certain place, and we accept the order and make the shipment on that basis.
29121 Now, diversion to somewhere else is--does not fulfill that contract, and subjects us to conditions which we do not approve.
Q. Now, have you ever engaged in any cooperative measures or entered into any agreement with any of your competitors to eliminate diversions?
A. No, sir.
Q. Are there any other effects on your company from a diversion of cement, other than just a breach of a contract between you and the customer?
A. Yes.
Q. Would you tell us what these effects are?
29122 A. The principal effect is interference with our regular resale outlets at the point to which the diversion was made.

By Mr. Withrow:

Q. Have you ever had any complaints from any other dealers as the result of such diversions?
A. Yes, sir.
Q. And what was the nature of these complaints?
A. Refusal to continue to handle our cement if we were going to permit out-of-town people to ship it in there and distribute it, as had been done.
Q. In other words, allowing diversions affects the good will between yourself and your customers and the prospective customers?
A. Yes, sir.
Q. Now, would you tell us whether or not your business, to any extent, depends upon the good will of your
29123 purchasers, your dealers?
A. Very largely.
Q. Do you sell to more than one dealer in any given town?
A. Yes, sir.
Q. Now, do you sell to a dealer in the one town and

allow him to take delivery at a point where he does not have any place of business?

29124 A. No, sir.

By Mr. Withrow:

Q. Why don't you allow that practice?

A. To preserve our position in the other locality, and to retain the good will of customers sold there.

Q. Would there be any difference in effect, be-
29125 tween a diversion and where your knowingly allowed it?

A. No, they would be the same.

Q. Mr. Warren, in arriving at your sales policy, do you take into consideration the interests of the ultimate consumer of cement?

A. Yes, sir.

Q. Would you tell us what you do?

A. We must retain his good will, and he must be satisfied with the products to continue using it.

Q. Now, after you have delivered cement, Mr. Warren, to a dealer's warehouse, would you tell us whether or not you have ever made any attempt to regulate the destinations at which he resells that cement?

A. No, sir.

Q. Have you ever made any attempts to regulate the price at which he resells his cement?

A. We have not.

Q. Would you tell us whether or not you have attempted to exercise any control whatsoever over the sales by dealers after you have delivered the cement to them?

A. No, sir.

Q. Mr. Warren, has the Osborn mill shipped by truck since you have been connected with it?

29126 A. No, it has not.

Q. Does it allow customers to come to the mill and truck cement?

A. No, sir.

Q. Is this an absolutely inflexible rule?

A. Well, we accommodate a neighbor with a—in some emergency—particularly a few bags of our special cements; but we do not make regular shipments to customers by truck. The exceptions to which I refer are small; quantities for which someone was in a hurry, and are infrequent.

Q. Do dealers ask to be allowed to truck cement from your mill?

A. No, I don't know of any.

Q. Do you know, from your own knowledge, Mr. Warren, whether or not the Southwestern Company allowed trucking at the Osborn mill before you became associated with the company?

A. Yes.

The witness identified Resp. Ex. 1776 as a letter to dealers taken from their files concerning prices of truck-
29127 load lots of their various cements; Resp. Ex. 1777 as a notice, dated May 4, 1931, and taken from their files, to salesmen and men in their office concerning a discontinuance of trucking at their mill.

29130 (RESP. EXS. 1776 and 1777 were offered and received in evidence.)

By Mr. Withrow:

29131 Q. I believe you testified, Mr. Warren, that you knew, of your own knowledge, that the Southwestern Company had trucked cement prior to your coming with it in 1933. Will you tell us how you knew?

A. Well, since coming with the company I had certain adjustments to make arising out of transactions made for cement delivered by truck.

Q. Would you just tell us briefly about those adjustments you had to make?

A. Well, in the one case it was an adjustment of the final payment on a contract in which the claim consisted of cement not delivered, the customers' records and ours disagreeing as to the cement delivered and the cement received, and another case was by a dealer who had re-
29132 fused to handle our cement because of distribution of our brand to his customers from trucks passing through his territory and from our place. As a result of which I acquainted myself with the fact that we had been doing some trucking.

Q. So that, in a general way, you are familiar with the effect of the trucking policy of the Southwestern Company at Osborn?

A. Yes, I think so.

Q. Have you ever considered the question of reopening the Osborn mill to trucking?

A. Yes, I have considered it.

Q. And what conclusion did you reach?
A. I saw no occasion to do so.
Q. What is your unit of sales of Portland cement?
A. Carload.
Q. Would you tell us from your knowledge of the way Osborn trucked how the average truck sale compared in quantity with the carload sale?
Mr. MacIntyre: Now, just a moment. We are again going back into the history of something, a detailed history of something that occurred before this man became connected with the Osborn Company.
Trial Examiner Norwood: Yes, I think that has been covered; the figures are in on that dozens of times.
Objection sustained.

29133 By Mr. Withrow:

Q. Well, did you consider the relative size of the average truck sale and the average carload sale when you considered the question of opening your mill again to trucking?
A. Yes, that is a factor.
Q. Well, how would it be a factor to your company—I mean how important a factor?
A. It would be a very important factor.
Q. Well, would you tell us what factors you did consider? We have mentioned now the comparative size of carload lots. Was there any other factors that you considered?
A. Comparison of whether or not it would make any improvement in our present method of doing business. Those factors would be satisfaction to the customer, requirements of the customer, availability of facilities, highway conditions, weather conditions, cost of delivery, responsibility of delivery, and I won't say that that is all, but those are the factors.
Q. Is rail transportation now used exclusively by your mill at Osborn with the few exceptions you mentioned?
A. Yes, sir.
29134 Q. Does the Osborn mill have any customers located at destinations not served by railroads?
A. No, we do not.
29135 Q. Mr. Warren, would you tell us whether or not there is any agreement or understanding between you and any of your competitors for you not to truck cement?

A. There is none.

Q. Mr. Warren, do you know of your own knowledge whether the Southwestern Company trucked cement from any of its other mills?

A. We do.

Q. So that we can assume that there is no general company policy with reference to whether trucking will be done or not; is that correct?

A. No, sir.

Q. And you are the sole person in charge of determining whether or not you will truck from Osborn?

A. Well, our superior officers would have something to say. They have asked me to investigate this subject, but at Osborn it would be left to me, and has been left to me.

Q. Now, is there any trucking being done today in any territory where you market cement?

A. Yes, sir.

Q. And where is that?

A. Well, Michigan, where we market very little,
29136 but points in northern Ohio surrounding Toledo and Cleveland.

The witness identified Resp. Ex. 1779 as an office memorandum signed at the bottom by Mr. Noland; Resp. Ex. 1780 as a report from their salesman, Wilson, to their office, regarding trucking, and some towns in his territory;
29137 Resp. Ex. 1781 as an announcement from Standard Portland Cement Company to a dealer at Bowling Green, Ohio, regarding truck deliveries of cement. This announcement was in their files having been sent to them by their salesman in that territory. The same applies to Resp. Ex. 1782. He identified Resp. Ex. 1783-A and B as a quotation with terms and conditions on the back, from the Wolverine Cement Company to A. E. Avery Supply Company at Bowling Green; Resp. Exs. 1784 and 1785 as reports from Southwestern's salesman, Wilson, in Northwestern Ohio; Resp. Exs. 1786, 1787 and 1788 as announcements from competing cement companies to customers which Southwestern found in the field; Resp. Ex.
29138 1789-A and B as a quotation from Peerless with the terms and conditions on the back which they secured from Napoleon, Ohio, F. C. Dielman; Resp. Ex. 1790 as a notice from Mr. Noland to Southwestern's two northern Ohio salesmen; Resp. Ex. 1791 as an announcement to the Wistner Coal Co. at Van Wert, Ohio from Wolverine which

Southwestern secured from the Wistner Coal Co. These transactions came to his attention.

29142 (RESP. EXS. 1779, 1781, 1782, 1783-A, 1784, 1785, 1786, 1787-A, 1788, 1789-A, 1790, and 1791 were offered and received in evidence.)

By Mr. Withrow:

29143 Q. Mr. Warren, have you attempted to meet this trucking competition which you find in northern Ohio?

A. No, sir; we did not.

Q. And would you tell us why you have not?

A. Well, we can't truck there economically. It costs too much to truck to those distant points.

Q. Mr. Warren, would you tell us just briefly what your terms of sale and discount are?

A. Our terms provide for payment of all invoices within 30 days, and provide that 10 cents a barrel discount may be taken if payment is made in 15 days.

Q. Do you vary this policy at all in the event purchasers buy over a long period of time, or buy in large amounts?

A. It is not a matter of long period of time so much as the amount of their purchases. Those who buy frequently, to save them the necessity of payment every day or two, we allow them to lump their shipments and pay their bill twice a month and still secure the 15 days' discount.

Q. Do you know whether or not your terms of discount are generally uniform with those of your competitors in your market area?

A. I think they are; yes, sir.

Q. Would you tell us why you make yours the 29144 same as your competitors?

A. Well, I do not want competitors to claim an advantage of having better, more liberal terms of payment that we have.

Q. Well, why don't you make a more liberal term than they have?

A. Well, they are very liberal now, very generous. That discount is a very high percent. It will run six or seven percent, and I think it is high enough.

The witness identified Resp. Ex. 1792 as a notice to Southwestern's Indiana salesmen regarding terms for quoting highway contractors; Resp. Ex. 1793 as a notice to two of their salesmen by their credit manager regard-

ing terms of payment on all dealer business. He recognized the signatures on Resp. Exs. 1792 and 1793 as those of Mr. Jennings.

29146 (RESP. EXS. 1792 and 1793 were offered and received in evidence.)

29147 By Mr. Withrow:

Q. Have you ever had a so-called dealer discount

29148 since you have been associated with the Southwestern Company?

A. Only the cash discount for prompt payment.

29151 Q. Mr. Warren, does the Osborn plant in its sales come into contact with imported cement?

A. No, sir.

29152 Q. Now, Commission's Exhibits 210-C, D, E, F—well, as a matter of fact, the whole exhibit—C through N, show that you received from the Code Authority and the Trade Practice Committee announcements concerning filings affecting imported cement.

Did you request that copies of these documents be sent to you?

A. I don't remember ever requesting it.

Q. Have you ever entered into any agreement with any of your competitors concerning imported cement?

A. No.

Q. When did the Southwestern Portland Cement Company join The Cement Institute, Mr. Warren?

A. The membership for the eastern office, or the Osborn office, was 1930, and the membership on behalf of the El Paso and Los Angeles mills was in 1933.

29153 Q. So that when you came with the Osborn mill, it was a member?

A. It was a member when I came.

Q. What do you mean by the fact that the Osborn mill was a member of the Institute, as against the other two mills not being members?

A. Well, there were no activities in the West, and there were in the East.

Q. And you paid dues just for the Osborn?

A. Paid dues just from the Osborn mill.

Q. Hase the membership of the Osborn mill continued up to the present time?

A. Yes, sir.

The witness identified Resp. Ex. 1804 as a letter from

him to Mr. Merrill, their general manager; Resp.
29154 Ex. 1805 as a copy of a letter from Mr. Coffin to Southwestern; Resp. Ex. 1806 as a copy of a letter from Mr. Merrill to Mr. Coffin, Chairman of The Cement Institute. Resp. Exs. 1805 and 1806 were brought to witness' attention while those transactions were proceeding.
29156 (RESP. EXS. 1804, 1805, and 1806 were offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Warren, have you ever held an office in The Cement Institute?

A. An office; yes, sir.

Q. What office did you hold?

A. I was a trustee for a short time, and later a member of the Code Authority.

Q. Do you recall what district you were a trustee from?

A. From district from Texas.

29157 The witness identified Resp. Ex. 1807 as a copy of a letter from Mr. Merrill to Mr. Blair which Mr. Merrill sent to the witness.

29158 (RESP. EX. 1807 was offered and received in evidence.)

By Mr. Withrow:

Q. Did you tell us, Mr. Warren, that you served on the Trade Practice Committee?

A. Well, I did not tell you that. I served on the Code Authority and the Trade Practice Committee.

Q. Were you active on the Trade Practice Committee?

A. No.

Q. Do you recall whether any of the other officers of the Southwestern Copany have served on any committee or board of The Cement Institute?

A. Mr. Blair later served as trustee from Texas.

Q. Have you ever attended any Institute meetings?

A. Yes.

29159 Q. Could you tell us whether or not there were any discussions of price and marketing policies at Institute meetings?

A. No discussions of price, but marketing policies were discussed at meetings of the trustees in connection with preparation of the Code of Fair Trade Practice under the N.R.A.

Q. Will you tell us whether or not there were any agree-

ments with reference to price or marketing policies arrived at at Institute or trustee meetings?

A. No.

Q. Would you tell us under what circumstances you attended most of the meetings you attended?

A. As a trustee or member of the Code Authority.

Q. That was during the N.R.A. Code period?

A. During the N.R.A. Code period, yes.

Q. Have you attended very many meetings since the N.R.A. Code?

A. No.

Q. Did the Southwestern Company have any function to perform in connection with the preparation of the freight rate books, as far as you know?

A. I don't know of any.

Q. Did you ever report specific job contracts to The Cement Institute?

A. Yes, we did.

Q. Will you tell us during what period you did this?

29160 A. During the N.R.A. Code period and for—well, that's the only time during my experience.

Q. Are you reporting specific job contracts to the Institute now?

A. No.

Q. Now, when you found any duplication in specific job contracts between your company and some competing company, will you tell us whether or not you agreed with those companies as to which ones should cancel their contract?

A. No, we try to find out from our customers what quantity of our product he would agree to ship.

Q. Did you ever agree with any competitor in the case of a duplication of contracts?

A. No.

Q. Do you receive any statistical information from The Cement Institute?

A. Yes, sir.

Q. Would you tell us how you use it, and whether or not it is valuable to you?

A. I make—I make very little use of it, but merely as an accumulation of information; I have no other use, other than to inform myself as to what it tells.

Q. Mr. Warren, would you tell us whether of not you have agreed to allocate business with your competitors on

the basis of any figures distributed by The Cement Institute?

29161 A. I have not.

Q. Have you ever limited your production of cement, or clinker, or your shipments, in accordance with figures distributed by Mr. Mallory or by The Cement Institute?

A. No.

Q. How do you determine, Mr. Warren, how much cement you will produce in any given year?

A. Well, it has been determined for me ever since I have been there, because the bins and storehouses were full, and we had to shut down whenever they were refilled again.

Q. When you say—

A. (Continuing) As a matter of fact, we have only been able to produce what we have been able to ship during that period.

Q. How do you determine how much cement you will sell in any given year?

A. Well, in advance?

Q. No.

A. You can't determine—

Q. No.

A. You can't determine that. We attempt to sell all we can, but we have no way of knowing what business we will get.

Trial Examiner Norwood: Don't you make estimates for production?

The Witness: Well, the situation is, if the bins were full, and I perhaps could make an estimate, fairly

29162 good estimate, of what the demand was likely to be for a few months hence, based on building permits, contract awards, and other statistics available, but I have been—forced to hold down because of the full storages.

Trial Examiner Norwood: I see.

Q. Would you tell us, Mr. Warren, whether or not you think you have received any benefits from your membership in The Cement Institute?

29163 A. Yes.

By Mr. Withrow:

Q. Would you tell us what benefits you think you have received?

A. Well, we have benefitted from the freight rate book, and I placed value on the specific contracts reporting for the information there as a check on duplication of contracts, and, of course, during the N.R.A. Code period there must be some agency for preparation of a Code. So, if that is a benefit, we have benefitted from that.

Q. Do you use the Institute freight rate books to ascertain freight rates?

A. Yes.

Q. Would you tell us why you use the Institute rate books?

A. Well, they are compiled for that purpose, for handy reference, and to save us the expense of preparation of similar material.

Q. Do you have a traffic department at Osborn?

A. Yes, sir.

Q. What does it consist of?

A. Well, it consists of part time of one man who divides his time between traffic and sales, and part time of a clerk who divides his time between order desk and transportation matters.

29164 Q. In case there is an error in the Institute freight rate books, and you learn of the correct rate, would you tell us whether you use the Institute rate or the correct rate?

29165 A. The correct rate.

By Mr. Withrow:

Q. Now, to go to this matter that Mr. Paulson is referring to—

Trial Examiner Norwood: That is, correct in accordance with the railroad tariffs?

The Witness: Yes, sir.

By Mr. Withrow:

Q. Now, to go back to this matter that Mr. Paulson was referring to,—would you tell us whether or not you change your delivered prices whenever you learn of a blanket change in the freight rates?

A. No.

Q. And under what circumstances do you change your delivered prices?

29166 A. Well, we change them when we change them based on the delivered prices found in the field.

29174 Q. Mr. Warren, would you tell us whether or not you recall a 25-cent increase in the delivered prices which occurred in July, 1933?

A. Yes, sir.

Q. Are you familiar with the circumstances surrounding that increase in price?

A. Yes, sir.

Q. Would you tell us what they were?

A. We found the price advanced by quotations which we secured, and at the same time we were shortening our hours and increasing our wages and our prices—our price was very low at the time, and we were glad to follow that advance.

Q. Did you authorize Southwestern's following this price advance?

A. Yes, sir.

29175 Q. Do you recall now, Mr. Warren, why your labor costs and other costs were increasing at that time?

Mr. MacIntyre: I object to that, if Your Honor please. It is irrelevant and immaterial as to why certain other things were happening in the cemetn industry that do not relate particularly to the manner or methods of fixing prices or price making.

Trial Examiner Norwood: Well, can't he show that the price responded to increased cost of production or
29176 the price responded to increased demand, or the price responded by a drop from diminished demand or to diminished demand?

Mr. MacIntyre: I do not see that it has any relation to his method of price making. We are not talking about the level of prices. They are not in issue. The level of prices is not; the method of pricing and price-making is in issue.

Trial Examiner Norwood: The objection is overruled.

29195 Trial Examiner Norwood: And I think that the Commission did put in all of these negotiations about dividing up available business, and the N.R.A. never did adopt that, did it?

Mr. MacIntyre: It was a part of the Code with respect to a consideration for that, but they never did approve any plan that the industry ever submitted to them.

29205 By Mr. Withrow:

Q. Did you, Mr. Warren, or did anyone associated with your company, have anything to do with the preparation of the Code, the N.R.A. Code for the Cement Industry?

A. As a trustee, the drafts of the Code were presented for discussion, and I might have taken minor parts in that discussion. If I did, it was minor.

Q. Do you recall Article XI of the N.R.A. Code for the Cement Industry?

A. Yes, sir.

29206 Q. Do you recall whether that provision was ever in effect?

A. Yes, it was in effect for a few months.

Q. When that article was suspended, did you or any one in your company take part in negotiations between the Code Authority for the Cement Industry and the Code Authority of the dealer—building material supply dealer industry?

A. Well, I made, at the instance of the Administrator, Deputy Administrator—that is not quite right, it was the—I believe it is, too, Mr. Janssen or Mr. Murray, Government representatives for the N.R.A., who asked the Code Authority of the Cement Industry, to come to Washington and meet with the Code Authority of the Builders' Supply Dealers in the hope of arriving at some substitution for Article XI.

Q. Was any agreement as to a suitable article to be put in the Cement Code reached at that meeting?

A. No, there was not.

Q. Did you attend any other meetings?

A. I do not remember any others.

Q. Do you know whether the two Code Authorities ever reached an agreement on a substitute provision?

A. No, not that I know of.

29210 Q. I believe you have stated you were a member of the Trade Practice Committee. What were your activities in that connection, Mr. Warren?

29211 A. I had no activity, although I received copies of communications to the Trade Practice Committee from its chairman.

Q. And, just state briefly what this Trade Practice Committee was?

A. There was a Code Authority for the Cement In-

dustry under the N.R.A., and when the N.R.A. was abandoned, in response to request of the President of the United States that industries attempt to retain what they could of the progress made under the Codes, or under the N.R.A., the name of the Committee was changed, there being no Code Authority, no—or under the N.R.A.—to Trade Practice Committee of The Cement Institute.

Q. So, as a previous member of the Code Authority, you were appointed to the Trade Practice Committee?

A. Yes, sir.

29213 Q. After the termination of the N.R.A. Code, do you recall whether the Trade Practice Committee continued to receive price filings?

A. Yes, sir.

Q. Mr. Warren, I show you Commission's Exhibit 277-2-B through 2-E, which is correspondence in July, 1935, between the Monolith Company and the chairman of the Trade Practice Committee, and I ask you if you recall the incident involved?

Trial Examiner Norwood: Now, are those papers that he has had anything to do with?

Mr. Withrow: On the face they show he received a copy, Your Honor. I will ask him.

By Mr. Withrow:

Q. Did you receive a copy of those papers?

A. Yes, sir.

29214 Q. Well, Mr. Warren, would you tell us whether you took any action in connection with the correspondence between the Monolith Portland Cement Company and the chairman of the Trade Practice Committee in July of 1935, concerning prices bid to the Federal Government in the State of Arizona?

A. No.

Q. Would you look at Commission's Exhibits 277-2-B, 2-C, 2-D, and 2-E, and tell us whether you received copies of those (indicating)?

A. Yes.

Q. Are these exhibits typical of the documents which you say you received as a member of the Trade Practice Committee? I mean, of letters between companies and the Trade Practice Committee?

A. Copy; yes, sir.

Q. Did you pay any attention to such documents on their receipt?

A. No.

29215 Q. Could you tell us whether or not you were active in connection with any complaints filed with the Trade Practice Committee?

A. No.

29216 Q. Mr. Warren, this Federal Trade Commission Exhibit 277-2-E, refers to a meeting of the Trade Practice Committee held in Chicago on July 9, 1935 (indicating).

Would you tell us whether or not you attended that meeting.

A. Yes.

By Mr. Withrow:

Q. You attended the meeting?

A. Yes, sir.

Q. Do you recall whether or not the Osborn mill of the Southwestern Company continued to file prices with the Trade Practice Committee after the Code?

A. Our prices on file were allowed to stand, but I don't remember whether or not we filed any additional prices.

29217 Q. Now, are you familiar with the Compendium prepared by the Trade Practice Committee?

A. Yes, sir.

Q. Did you take any active part in the preparation of that document?

A. No, sir.

Q. Would you tell us whether or not you ever considered yourself bound to follow any of the terms, conditions of sale, or practices, contained in the Compendium?

A. I did not.

Trial Examiner Norwood: Well, did you follow them?

The Witness: Sir?

Trial Examiner Norwood: Did you follow them, of your own free will and accord?

The Witness: Well, to the extent that we—that our practice follows them, it was of our own free will and accord; yes, sir.

Trial Examiner Norwood: Well, did you follow them?

The Witness: I don't know that I have made a comparison to be sure.

Trial Examiner Norwood: You don't know whether you followed them or not?

The Witness: No, sir.

By Mr. Withrow:

Q. Would you tell us whether or not you made
29218 any change in your practices, terms, or conditions of sale in the winter of 1935 or 1936 as the result of the publication of the Compendium?

A. I did not.

Q. Would you tell us whether or not you felt free to change your announcements to the trade concerning the terms and conditions of sale after the publication of the Compendium?

A. Yes.

Q. Am I correct in my understanding that you don't know whether your practices are similar with regard to the Compendium?

A. I have never made a comparison.

Q. Will you tell us whether or not you considered the Compendium was an agreement as to what marketing practices should be used in the industry?

A. I do not so consider it.

29235 *Cross-Examination by Mr. MacIntyre.*

Q. Mr. Warren, Mr. Withrow asked you about the price increase of 25 cents per barrel that occurred in July, 1933. Do you recall?

A. Yes, sir.

Q. I believe you stated that you followed that.

A. Yes, sir.

Q. And that you followed it because that you felt that it was necessary due to certain increases in some factors. What were those factors?

A. Well, I followed it because I felt our prices were too low, and that our costs—the costs of commodities that we were purchasing were increasing, and our labor wages were advancing.

Q. I thought I understood you to say, though, that something had increased, some factor had increased by an amount equal to this 25-cent price advance of that date. Will you please put me straight on that if I am in error and tell me what the factor is, if I am correct.

A. I don't think I so testified.

Q. Do you understand your testimony, then, to be just what you have stated?

29236 A. Yes, sir.

Q. And nothing more?

A. Well, the enumeration of the factors—I will enumerate them again, if you prefer. They were the fact that I felt our prices were too low, and that our costs of commodities were advancing, and that our labor rates were increasing.

Q. Do you recall a price advance of July, 1932?

A. No, sir.

Q. You don't recall one that took place, then?

A. No.

29237 Q. Do you know, Mr. Warren, of a price advance in the cement industry during July, 1932?

A. No, sir.

Q. You have no knowledge whatsoever of such an advance?

A. No, I was on the Pacific Coast all of the year 1932.

Q. Were you out there in December, 1932?

A. No, sir; I went about the first of the year.

Q. You have not heard that there was—

A. In December, 1932; I was; yes, sir.

Q. Where?

A. On the Pacific Coast.

Q. And in July, 1932?

A. In July I was in Los Angeles at the Olympic games, that's how I remember the date. In December I was in the hospital at Marshfield, Ore., with a broken arm, so I recall that very well.

Q. Were you in the employment of the Portland Cement Association on the West Coast?

A. Yes, sir.

Q. Were you informed through the members or
29238 officials, or other employees of the Portland Cement Association, of a price advance that took place in the cement industry during July, 1932?

A. I have no recollection of that now. My work had nothing to do with the sale or prices of cement.

By Mr. MacIntyre:

Q. I did not understand.

A. M work had nothing to do with the sale of or prices of cement.

Q. Where were you in January, 1930, Mr. Warren?

A. In Chicago.

Q. What was your position at that time?
A. I was assistant general manager of the Portland Cement Association.
Q. Who was the general manager?
A. Mr. William M. Kinney.
Q. How long has he been general manager of that association?
29239 A. November, 1918.

By Mr. MacIntyre:

29239 Q. And he continues in that position?
A. Yes, sir.
Q. During January, 1930, and down to the time that you became connected—that is, left the employ of the Portland Cement Association, and became connected with the Southwestern Portland Cement Company,—who was the president of the Portland Cement Association?
A. They had numerous presidents until the fall of 1931, during which period the president was also—not a paid president, he was more or less of an honorary president, and representative of one of the members; but during the summer of 1931 the full-time president was employed, and took his office, some time in September, 1931.
Q. And who was that?
A. E. J. Mehren.
Q. How do you spell it?
A. M-e-h-r-e-n.
Q. Did he continue as president until you left there to become a member—I mean, an official of the Southwestern Portland Cement Company?
A. Yes.
29240 Q. Now, since you became a member—an official, an employee, of the Southwestern Portland Cement Company, in March, 1933, I believe you stated that you had not—that is, that there was no agreement, working agreement, between the Southwestern Portland Cement Company and any of its competitors.
29241 I am citing you now to your testimony—there was a question in your testimony, a response thereto, appearing on lines 15 and 18, page 28726,—Mr. Withrow asked you if there were such agreements, and your answer was "No." Do you recall that?

Mr. Withrow: Your Honor, before we go into that, I think that Mr. MacIntyre should take the record, and read from it, because he has misquoted the question, I feel very sure.

Mr. MacIntyre: Well, I will go into the page specifically.

Trial Examiner Norwood: Well, he may take the record and read it, or he may ask the witness what he said along that line.

Mr. Withrow: I don't mind if he asks the witness what he said, but the question has been misstated, and it might be material and might not.

By Mr. MacIntyre:

Q. Well, showing you lines 15 to 18, page 28726, I ask you if you recall that testimony of yours (showing official record to witness)?

A. Fifteen to eighteen?

Q. Yes, this question, and your answer in response to it (indicating in official record).

A. Yes, I think that—

29242 Q. Now, did you mean by that, Mr. Warren, that your company has no, and has had no price,—working agreement,—with any of its competitors?

A. None that I ever heard of, or that I know anything about.

Q. As to the methods in which it makes its price, or as to the prices it actually quotes?

A. (Witness makes no response.)

Q. Your answer goes to both of them?

A. Yes, sir.

Q. Now, Mr. Warren, I will ask if you don't know that during March, 1938—you do know that during that month there was filed a suit against your company and against the Universal-Atlas Cement Company, the Lone Star Cement Corporation, and the Trinity Portland Cement Company, and others, as defendants, by the State of Texas, in Travis County, charging the defendants with price fixing, and price agreements, in violation of the anti-trust laws of the State of Texas.

29244 Q. Will you please state, Mr. Warren, whether or not that you knew that such a suit was filed against your company, and the other defendants that I named?

A. Yes, I knew a suit was filed.

Q. Now, don't you also know, Mr. Warren, that your company, and some of the other defendants, agreed to a settlement and paid the State of Texas $400,000 in settlement of that suit?

29246 A. I was told that the matter had been settled, and I understood by agreement with the State.

By Mr. MacIntyre:

Q. To pay them $400,000 to drop this price-fixing charge against your company; isn't that correct?

Mr. Withrow: Your Honor, I object to the characterization of the charge. This question goes beyond the preceding questions, and I think that it is necessary to object to it.

29247

Mr. MacIntyre: No.

Mr. Withrow: That is not the best evidence of what the suit charged, or what the settlement was, and we object to it.

Mr. MacIntyre: Well, we want to—

Trial Examiner Norwood: He may inquire into what this man knows.

Mr. Withrow: The decree is the best evidence.

Trial Examiner Norwood: He can certainly test his knowledge along these lines.

Mr. Withrow: I will ask to have the question re-read and to see whether this tests his knowledge. I think that the characterization of the case by Counsel for the Commission is very prejudicial.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: That question is permissible on cross-examination under the circumstances that are before us here.

The objection is overruled.

Mr. Withrow: Your Honor, at this time on Your Honor's ruling, I move to have this case dismissed as to the Southwestern Portland Cement Company.

Trial Examiner Norwood: You had better make that motion before the Commission.

29248

The motion is denied.

Mr. Withrow: Thank you. Exception.

Trial Examiner Norwood: Answer the question.

A. I am not familiar with the terms of the decree, but was told that a settlement had been made.

By Mr. MacIntyre:

Q. And you also learned from your company that it and the other defendants paid $400,000 in a settlement of it, or agreed to pay such a sum, didn't you?

The Witness: Yes, sir.

By Mr. MacIntyre:

Q. And you do know that the charge there was price fixing and price methods, agreements with your competitors, don't you?

29249 A. I have never read the charge.

By Mr. MacIntyre:

Q. Well, didn't you learn from officials of your company that that charge was involved in that suit; that is, that it was charged that it had fixed prices and entered into agreements to maintain pricing methods with its competitors?

Mr. Leisure: The same objection, Your Honor. The complaint, itself, is the best evidence as to what was charged.

Trial Examiner Norwood: The objection is overruled.

Mr. MacIntyre: I am asking him now if his other associates in his company did not so tell him.

Trial Examiner Norwood: It is perfectly proper cross-examination.

Go ahead.

A. Well, what I was told bears on or is included
29250 in your question, but I do not know whether every bit of your question is.

By Mr. MacIntyre:

Q. That is, they did tell you that the charge in the suit against your company and the other defendants was that they had, as competitors, agreed on price fixing and price-making methods?

A. That is the part I am uncertain on, as to what—the methods there.

By Mr. MacIntyre:

Q. Well, what part are you certain of that they did tell you about?

A. State that question again.

Q. That is, the price fixing and agreement with competitors were involved?

A. Agreements, but the details of that I do not know because I never read the decree or the charge.

Q. But the price-fixing agreements were involved?

29251 Q. They did tell you that the charge of price fixing and agreements were involved?

A. Yes, sir?
Q. That is, who in your company told you that?
A. Mr. Powell.
Q. Mr. F. W. Powell; is that it?
A. F. H. Powell.
Q. F. H. Powell, president of Southwestern Portland Cement Company?
A. Yes, sir.
Q. Did Mr. Merrill also tell you?
A. Well, I do not think I have seen him; I do not remember him ever telling me anything about it.
Q. Were they the ones that also told you that they had agreed to pay $400,000 in settlement of the suit?
29252 Q. Let me find out now who it was that did tell him that $400,000 had been paid as an agreement, agreement to pay $400,000 for the dropping of the suit?
A. Mr. Powell told me it was, that's all.
Q. And that an agreement was made to pay the $400,000?
A. I do not recall him telling me anything about an agreement made to settle it; told me it was settled.
Q. Who was it told you about the $400,000?
A. Mr. Powell.
Q. To be paid?
A. Mr. Powell.
Q. Mr. Powell told you that, also?
A. Yes, sir.

29253 By Mr. MacIntyre:

Q. Well, I am now attempting to have cleared up in the witness' testimony as to whether or not it was Mr. Powell that told him that the $400,000 had been paid to the State of Texas by the Southwestern Company, and the other defendants in the case in connection with the dropping of the suit; that is, an agreement to pay that in connection with the dropping of the suit.
A. Well, I do not remember that he told me it had been paid; he told me that—
Q. That is, that they had agreed to pay it?
A. That was the sum involved, and that the case was settled or being settled; that is as far as I can give you any information about it

29255 Washington, D. C.,
December 18, 1939.

29256 GEORGE E. WARREN thereupon resumed the stand and testified further as follows:

29258 By Mr. Withrow:

Q. On the record, page 28726, in answer to the first question appearing on that page, which is as follows, to the effect of:

"Q. What is the approximate capacity of all three mills of the Southwestern Company?"

The answer appears:

"A. About 3,500,000 barrels."

A. That was about 5,500,000.

29259 Q. On record page 28773, in answer to the second question on that page, which is as follows:

"Q. Well, why it it, Mr. Warren, that you meet a new low market price as soon as you find it is being quoted?"

The answer is here:

"A. To retain the custom that we have built up." Was that your answer?

A. To retain the custom?

Q. Yes.

A. The customers.

Q. Now, on record page 28809, in line 14, the question is:

"Q. To whom do you send lists of price bases of lists of basing points?"

The answer is:

"A. We send them to anybody."

Is that your testimony?

A. No, we do not send them to anybody.

29260 Q. On page 28814, the question beginning in line 14:

"Q. How do you inform them?"

"A. By telephone or through salesmen we can reach. We do not want to lose a carload of business because of waiting for the man."

Is that your testimony, Mr. Warren?

A. No; that preceded the broadcasting for the quotations—waiting for the mail.

Q. I assume that "mail" is spelled m-a-i-l?

A. Yes.

29261 Q. On record page 29088, the question beginning in line 20, referring to certain exhibits, quotations, and announcements:

"Q. And where do you secure it from?"—

—maybe I had better read the question before, Mr. Warren:

"Q. What has been the practice in your company about securing material such as this copy?

"A. Well, our practice is to secure everything we can which would be either a clue or a key or information as to how cement was sold and transactions handled."

The next question:

"Q. And where do you secure it from?

"A. From our salesmen who in turn secure it from dealers and competitors."

Is that your testimony?

29262 A. No. From salesmen who secure it from dealers and they from competitors.

Q. The dealers secure it from competitors?

A. The dealers, the dealers; yes, sir.

29263 Q. On record page 29108, in answer to the third question on the page which is:

"Q. Why haven't you corrected your announcement with reference to sales to the W.P.A.?"

The answer:

"A. Well, we have—that has affected very few of our dealers, and there have been very few localities affected, and I haven't any way of knowing whether that change would be continuous. I would like to fall back to the policy in all cases, if I could; though I haven't felt it was necessary to circularize our entire trade."

Was that your answer?

A. Yes. I started to answer it one way and amended the phraseology.

Q. By "we have," do you mean you sent out another announcement, or not?

A. No, I broke off there from my introduction.

29266 Q. Mr. Warren, the last question on record page 29108 was as follows,—and I would like for you to answer it in your own words at this time:

"Q. Could you state for the record what percentage

of the sales of your cement you sell direct to dealers and what percent you sell to contractors?"

A. About 80 percent to dealers, and something less than the balance to contractors.

Q. Mr. Warren, in the original answer to that
29267 question you stated as follows:

"A. That varies with different years; but the last—say, 3 years, it would be about 80 percent to dealers, and something like, then, the balance of 20 percent to contractors."

Do you wish that answer changed to conform with your testimony this morning?

A. Yes.

29269 *Cross-Examination by Mr. MacIntyre (Continued).*

Q. Mr. Warren, I believe that in response to certain questions that Mr. Withrow has asked you, you have stated, with respect to various practices that you are using on behalf of your company, that you have not had any agreements, any understandings, any communications, any conversations, or any meetings with your competitors with respect thereto. Among such practices are those as to the pricing method used, tthe marketing policies, and particular bids that you have put in, particular
29270 action that you took with respect to invitations to bid, and mattters of that kind.

Do you recall the testimony?

A. I have had no agreements or understandings.

By Mr. MacIntyre:

Q. With respect to those matters?

A. Yes, sir.

29271 Q. That is, you, with your competitors, have had no agreements, understandings—

A. Have not.

Q. —meetings?

A. Have not.

Q. Conversations?

A. No, sir.

Q. Communications of any kind?

A. No, sir.

Q. Do we understand by that testimony now that you

are giving, Mr. Warren, that you at no time had any conversations with any of your competitors?

A. Well, do you mean with respect to those—

Q. With respect to those matters?

A. No, sir.

Q. Have you ever attended any meetings with any of your competitors at which those matters were discussed?

A. A have not.

Q. That is without limitation, I understand you to testify.

A. Yes, sir.

29273 Q. I believe that on your direct testimony you have mentioned that you were a member of the Trade Practice Committee of The Cement Institute; is that correct?

A. Yes, sir; I think I was—I think I was asked that; yes, sir.

Q. And you continued as a member of that committee through what period of time?

A. Well, I—that committee began, or originated, in the spring of 1935, and continued for a few months that year.

Q. And it was still in existence up to the end of the year, wasn't it? That is, through December, or the middle of December?

A. Well, it was later in the year.

Q. Late December?

A. I don't remember.

Q. It was still in existence at the time a Compendium of The Cement Institute, which is in this record as Commission's Exhibit 571—or 561—was published, wasn't it? It didn't go out of existence until after the time of the publication—

A. I don't know the publication.

Q. Well, it was after the Committee's considera-
29274 tion of that that it went out of existence, wasn't it?

A. Yes.

Q. In other words, it was still in existence during The Cement Institute's consideration of the—

A. At least a part of it; yes, sir.

Q. Yes.

You do know, as a matter of fact, that the Trade Practice Committee, of which you were a member, and some of which meetings you attended, that it considered the formulation and the publication of the Compendium, don't you?

A. Why, I was—you asked me if while I was a member it considered it. Yes, sir.

Q. I believe you have also testified that you were a trustee of The Cement Institute for the District of Texas. Do you recall that testimony?

A. Yes, sir.

Q. How long a period was covered by your services as a trustee?

A. A few months.

Q. Can you explain, Mr. Warren, why it was that you were elected as a member of the board of trustees of The Cement Institute to represent Texas while your only jurisdiction for your company was for the Osborn plant in the State of Ohio?

A. Yes, I think I can tell you that.

Q. Why?

29275 A. To save railroad fare for Mr. Blair. He was located at El Paso, and that was—it was considered quite urgent to get the wage matter portions of the Codes forwarded as early as possible, and the provisions of the articles of association of The Cement Institute set a procedure as to how the program would be carried out to prepare the Code, which put certain responsibilities upon district trustees, and I was asked by our company to serve for that reason.

Q. You don't know why your company asked you to serve other than those reasons, or why your company was asked specifically—

A. No, I don't.

Q. —to accept membership and represent The Cement Institute through the board of trustees with respect to the State of Texas, do you?

A. I don't believe I could say why. I don't know what would be in anyone else's mind, to answer to that.

Q. Well, I will read to you a sentence from Respondents' Exhibit 1807, and see if that refreshes your memory and recollection—

29276 Q. I will first ask you as to Mr. John Senior. Do you recall what firm he was connected with? He was
29277 president of the Trinity Portland Cement Company in Texas; isn't he?

A. I don't know whether he is or not. He was connected with it.

Q. Now, I will read you that sentence from this exhibit

and ask you if that refreshes your memory as to why your company was called upon to represent the State of Texas on the board of trustees.

"I have just had a telephone call from George Warren at Osborn"—

—this is apparently a letter from Mr. C. C. Merrill, I believe you so identified it, to Mr. Blair, in Texas—

"I have just had a telephone call from George Warren at Osborn, in which he stated that on account of the San Antonio and Republic plants not having joined The Cement Institute, and that John Senior had refused to act as a representative of the Texas mills, and, furthermore, that as Mr. Story of the Consolidated Company (and who is, I understand) the controlling factor in the Trinity Company) was already a trustee, and also that the International and Universal-Atlas had trustees, that they had asked Warren to represent the Texas plants."

Do you know why Mr. Senior refused to represent the Texas district as a member of the board of trustees of The Cement Institute at that time?

29278 I do not, no.

Q. It was not because he was fearful of the application of the anti-trust laws of the State of Texas against him, his company, your company, and the other members of the Institute, was it?

Mr. Withrow: Your Honor, I object to that question. I do not see how it is material or relevant to the issues in this case.

Trial Examiner Norwood: The objection is overruled.

A. I would not know what was in his mind. I think he was far away—as I recall, he had rather taken the side lines from active duty; but I would not know what was in his mind then, his reasoning.

By Mr. MacIntyre:

Q. How long did you continue as a member of the board of trustees of The Cement Institute?

A. A few months; I can't give you the exact number, but I think until the next election period, but I could not say exactly.

Q. Were you a member of the executive committee of The Cement Institute, Mr. Warren?

A. No, sir.

Q. That committee is something in the form of a sub-

committee of the board of trustees of The Cement Institute, isn't it,—or has been?

29279 A. I do not believe that is quite right.

Q. Well, it has as its membership members of a board of trustees, doesn't it?

A. As I recall, a trustee could serve if appointed, but I do not recall that the articles specified that members must be trustees—I mean exactly, now; I could not say.

Q. But the practice has been that they were trustees, hasn't that been the case?

A. I do not believe I could say without checking the lists of members of the board.

Q. Were you a member of the board of trustees of The Cement Institute during the first six months of 1938?

29280 A. No.

By Mr. MacIntyre:

Q. You did not hold any position in The Cement Institute during that period of time; that is after 1933, after 1935—after 1935?

A. Well, did you say 1935 or 1938?

Q. Well, we are talking about 1935, now. You said you did not continue to be a member of the board of trustees in 1938, so I am now asking you if you held any position in The Cement Institute subsequent to the time that you ceased to be a member of the board in 1935.

29281 A. No.

Q. That was your last position?

A. Yes, sir.

Q. You have merely been a representative of a member of The Cement Institute since that time; is that correct?

A. Yes. I do not recall any other participation.

Q. And have you attended meetings of The Cement Institute as a representative of your company and its membership in the Institute since then?

A. Yes, sir.

Q. On what dates?

A. Well, that is the date there were meetings for elections. I think the record would give—the minutes would give the dates.

Q. There were several meetings which you attended?

A. There were a few meetings; yes, sir.

Q. And you can't recall just at this time the particular days or the place of the meetings?

A. No.

Q. Attendance at those meetings were fairly general, were they not, of the industry; that is, representatives of other companies?

A. Yes, I think so.

Q. Mr. Withrow has shown you Commission's Exhibit 1063-A to D, and asked you if you did not get that, or if you did not get the invitation from the Procurement Division inviting you to bid on that project. Do you recall him showing you that?

29282

A. I do not know whether I recall him showing me that. He asked me about—if we had.

Q. That was for Rolling Fork, Miss.

A. If we bid in Mississippi.

Q. Well, he was showing you that; the record will show he was showing you that in connection with the question.

A. I see.

Q. And I think the record shows that you received the invitation referred to in that exhibit to bid.

Mr. Withrow: Is that from the Procurement Division?

Mr. MacIntyre: Yes.

Mr. Withrow: State Procurement Offices in Mississippi?

Mr. MacIntyre: That is right.

By Mr. MacIntyre:

Q. As I recall, he asked you why you did not bid on that invitation, and that your testimony was that was in the territory in which you did not solicit business, or it was out of your territory, or something to that effect. Do you recollect?

A. Yes, I said it was too far away.

Q. Is there any other reason why you would not want to bid on that particular project, Mr. Warren?

Mr. Withrow: Your Honor, I think the witness has given sufficient reason. I cannot see that any proper foundation has been laid.

29283

Trial Examiner Norwood: Overruled.

A. It being so far away, I do not remember that I examined it further, or—

By Mr. MacIntyre:

Q. You just simply passed it up after you saw the point where the cement was to be used?

A. Yes. I do not remember of going any further into it.

Q. You were not sufficiently interested in it any further to even figure out anything at all as to the terms, or anything else in the invitation; is that correct?

A. No, I don't remember anything about it.

Q. You did not even look to see, then, whether or not it asked for an f.o.b. mill bid, as well as a bid on the basis of cement laid down in Rolling Fork, Miss.?

A. I do not remember anything about that bid.

29294 Q. Well, if the Procurement Division, for its purchase of W.P.A. cement, for use in Rolling Fork, Miss., asked you, in this instance, for f.o.b. mill bid, on 1,620 barrels, to be shipped in carlots, what would be your reaction?

29295 A. I would probably file it, or drop it in the wastebasket.

By Mr. MacIntyre:

Q. You would not bid on it?

A. No.

Q. Then or now?

A. Neither.

Q. Why?

A. Well, obviously, if it had been sent to a large list, and I wouldn't be interested in it, having received it wouldn't necessarily engender interest in it,—nothing that—

Q. Why wouldn't it?

A. Well, we are so far away from Mississippi that we wouldn't give any serious thought to being able to transact business down there.

Q. What would the distance in that respect have to do with it, in the instance such as this one, Mr. Warren?

A. Well, it is nearly as far away from us as Maine.

Q. Yes.

A. And we wouldn't think, seriously, of being 29296 able to do business in a market that far away.

Q. You didn't take the trouble to figure it?

A. No, I did not.

Q. If you had figured it, and found that the commercial freight rate in that instance was only 98 cents per barrel, and that the Government could take the land-grant rate advantage, and that it was only 91 cents per barrel, and with the probabilities being, as actually turned out

to be, that the lowest possible bid that the Government had got was $2.73 in paper, what would you say?

29299 A. I don't think I would have considered it any further.

By Mr. MacIntyre:

Q. Why?

A. Well, it would look to me to be what I had originally suspected, a long ways away, and as of being not of serious interest, for that reason.

Q. And not of serious interest to you, why, because of that reason?

A. We have so many other things to do that—in efforts to secure business, that we don't attempt to cover areas that our experience has shown are out of our reach.

Q. Well, "out of your reach," just what do you mean by that, Mr. Warren?

I am trying to get, now, what you mean by these

29300 terms? I am talking about this particular one.

How do you think it was out of your reach? You didn't figure the freight rates.

A. Well, that was an opinion.

Q. What?

A. That's my opinion, that it is too far away.

Q. Well, what do you mean by too far away? What is your measure of standard in putting it too far away?

A. We have difficulty in getting business at much shorter range, and so it is not difficult with an extreme distance of that kind to be under the opinion, or the impression, that you are too far away.

Q. Why do you have difficulty getting it at a much shorter range?

A. Oh, there are a variety of reasons for that; some complain that they are unwilling to wait three or four or five days for deliveries, when there are much quicker deliveries closer at hand. That is one of the things.

Q. Your only—

Mr. Withrow (Interposing): Can the witness finish his answer?

Trial Examiner Norwood: Finish your answer.

Mr. Withrow: He has given one of the reasons. He said he had a number.

A. It is one of the reasons given by some cus-

29301 tomers that have been prospects at distant points.

Trial Examiner Norwood: Will you read the answer, please?

(Answer read by Reporter.)

A. That have been prospects and customers at distant points.

By Mr. MacIntyre:

Q. Have you ever experienced such exceptions from such customers, or any difficulties, if and when your price was lower than any of your competitors on a particular bid?

A. I don't think so.

Q Why couldn't you have done that here, then, bid lower than what the record shows the lowest bid price was, and obviate all of those difficulties, and take the business?

A. Well, I didn't look on that as a prospect for business, and didn't pursue the matter any further.

Q. Well, you have told us on direct examination, though, that you are out attempting to sell cement in every way that you know how. Do you mean to tell me here is an invitation that you did not even look into for the purpose of determining what you mill nets would be, —that is, how much you would net,—or whether you had a prospect of getting it,—you just got the invitation, and because it might have an f.o.b. mill bid in it, you threw it in the wastebasket,—is that what you want your testimony to be?

A. Well, you have put several comments into
29302 that. Now, I am a little confused as to what part of it—

Trial Examiner Norwood: Read the question.

By Mr. MacIntyre:

Q. I want to know how far your efforts go towards securing such business.

Mr. Leisure: Your Honor please, we have been over this so many times; he has told us that he didn't do business in that territory. I don't know how anything could be more clear.

Mr. MacIntyre: This happens to be an f.o.b. mill bid at Osborn, Ohio; he does business there.

Trial Examiner Norwood: It is cross-examination. Counsel is well within his rights.

Objection is overruled.

Mr. Withrow: May we have the question read again?

Trial Examiner Norwood: Read it.

(Last two questions read by Reporter.)

Trial Examiner Norwood: Read the answer.

(Last answer read by Reporter.)

Trial Examiner Norwood: Answer the question.

A. No. I testified, I think, before, that the reason I set it aside was its locality.

By Mr. MacIntyre:

Q. Well—

A. So I didn't take it seriously, further than that.

29303 Q. Well, with a calling for an f.o.b. mill bid, though, what has locality got to do with it, Mr. Warren?

A. Well, take the extreme, go to Wyoming, or—

Q. Yes.

Q. Yes?

A. —or Montana, there have been f.o.b. mill bids there that I just don't feel I have time to spend on those; by that, of course, they might be interesting, but what would— Further than that, I haven't any opinion.

Q. Well, at what point, and by what measure of standard, do you decide which ones are of interest in figuring, and which ones are of no interest to figure, when you get them calling for f.o.b. mill bids?

A. Well, I have had so few that it would be a matter of study of each case, I think.

Q. Well, with a record showing that the lowest bid the Government received on this invitation was $2.73 in paper at that point in Mississippi, that is, Rolling Fork, and with the freight rates as I have outlined them to you, giving you a mill net on a Government bill-of-lading at your mill of $1.67, and on a commercial bill-of-lading of $1.60, at your mill, what would you say as to the attractiveness of that bid to you?

29305 A. I didn't study the figures.

Trial Examiner Norwood: He asked you whether or not such a bid would have been attractive to you.

By Mr. MacIntyre:

Q. That is, any bid you could have obtained below that would have been attractive to you in the way of an f.o.b. mill price at Osborn.

A. You mean a return to us at Osborn, Ohio?
Q. Yes.
A. That amount would be attractive?
Q. Yes.
A. Very.
Q. I understand it to be the case, since you had testified in response to Mr. Withrow on direct examination, that you had taken mill nets as low as $1.20, so it would have been attractive from the point of mill nets.
A. Business of that return would be attractive, yes.
Q. So the sum and substance of your testimony, then, is you just did not go to the trouble of bothering with it after you saw the nature of the invitation; is that correct?
A. Well, I testified—and I do testify—that after
29306 seeing its location I didn't go further with it.
Q. You did not even bother with it at all after seeing the nature of the invitation?
A. No, sir.
Q. Mr. Warren, I show you Exhibits 1394-A to L, Commission's Exhibits 1394-A to L, and 1399-A to L. They were shown to you by Mr. Withrow, and I think that you stated some reasons why you did not bid on those two invitations.
Will you please let us know now if you have anything to add to the reasons that you stated to him as to why you did not bid on those?
Mr. Withrow: Mr. MacIntyre, would you mind segregating those because I did call one to the attention of the witness, and did not call the other.
Mr. MacIntyre: Which ones are they?
Mr. Withrow: I called 1934, I believe.
Mr. MacIntyre: All right. Let the witness tell us about 1934, then.
A. No, I have nothing to add.

By Mr. MacIntyre:

29307 Q. And your reason there that you just were not interested in bidding on large quantities of cement, the destination of which was not known, or the type of work on which it was to be used was not known?
A. No. I think I testified that it was a departure from the method that we had employed in quoting on such work.
Q. And that is your only reason for bidding?
A. No. I think I added further that our business de-

pended on sales to existing customers, and that this fact and departure, it brought that fact into consideration.

Q. That is, you had reason to believe that bidding on this would take away some business from some customer of yours that you desired to protect; that is, some dealer customer of yours that you desired to protect?

A. Yes, sir.

Q. Any other reason that you had?

A. No, I think I cited that the method of taking the bid was also a reason.

Q. That is, the method for asking for bids f.o.b. mill?

A. Yes, sir.

Q. The Government had done that on some previous occasions, hadn't they?

A. No, I don't think they had.

Q. Why didn't you like that method, Mr. Warren?

A. Distribution of cement to our customers or
29308 dealers had been following a custom which we thought was satisfactory.

Q. And you did not desire, of course, any new customs or new—that is, inauguration of new customs and new methods; is that correct?

A. No, I,—in thinking this over there appeared the possibility of a change reflecting unsatisfactorily on business that we already had and might anticipate.

Q. In what manner?

A. A large number of regular customers can be counted on to give us some future business. A bid of this kind would entail uncertainty that would offset such good prospect.

Q. Dealers, of course, if that is what you are referring to, always wanted all business direct, didn't they? That is, buy and sell through them? I mean, buy direct from you and sell through them?

A. No, I don't think they—there might be some holding that view, but I do not think that—I do not think all of our dealers held that view.

Q. Well, is there any more likelihood of your losing the favor of a dealer of that type with respect to bidding on this invitation than bidding on any of the other Government business that you had been bidding on all the time theretofore?

A. I thought so; yes, sir.

Q. Why?

29309 A. Many of them had discussed the question of Government purchases and relief cement at considerable length, and frequently—

Q. With you?

A. Yes, sir.

Q. They expressed themselves very strongly against you making sales such as this here called for in 1934 direct?

A. Many of them had; yes, sir.

Q. Suppose that this invitation, though, called for—or suppose it turned out that a few thousand barrels of cement were to be used in the purchase under this invitation, were to be used solely for rivers and harbors work by the War Department and not by W. P. A., would your attitude towards it have been different?

29310 A. No, I don't think so.

By Mr. MacIntyre:

Q. Why wouldn't it?

A. The same problem would confront us.

Q. What problem is that?

A. The problem of our regular distribution.

Q. Well, you do sell the Government for its rivers and harbors through the War Department direct, don't you?

A. I do not know that we have.

Q. I think the record shows that you have bid on such work.

A. We have bid.

Q. Yes.

A. I thought you said sold.

Q. Well, I mean bid.

A. Yes, sir.

Q. Well, why would it be any different in this invitation than in the others in selling?

29311 A. This invitation, as I recall it, did not specify the purpose or destination, and it might conflict with our regular business.

Q. It did not specify the destination, you say?

A. Sir?

Q. Did not specify the destinations?

A. Nor the work, as I recall it.

Q. It specified to be used on federal work, all federal work; of course there are some harbor and river work involved in that, we know that as a matter of general knowledge.

Isn't it a fact, Mr. Warren, that one of the objectionable features of this is that it called for bids f.o.b. mill without mentioning the destination on two lots of cement, one of those 5,500 barrels and the other 12,000 barrels for shipment in carlots?

A. The specifications, as the bid states, was for use by the Executive Departments of the Federal Government in Ohio and West Virginia, and contained no further explanations.

Q. Well, they did ask for bids, though, f.o.b. mill, didn't they,—that is, your plant, or on board cars at your plant?

A. F.o.b. point of production, yes.

Q. Yes. Wasn't that an objectionable feature from your viewpoint?

A. Well, in that all our cement has always been made at destination, has long been our practice, and a
29312 purchase of this kind would entitle the purchaser to call for its delivery at, or it would permit them to place it where they saw fit, which might conflict with customers that we already had.

Q. Do you try to control the method of buying cement by railroad so as to prevent them from trucking it at the point of their use; that is, cement?

A. No.

Q. In that respect you treat the railroads different than the Federal Government, don't you?

A. No. We give the Federal Government the lowest price we quote to anybody.

Q. At the point of use?

A. At destination, yes.

Q. But the railroad, you give f.o.b. their rail at your mill; that is, the railroad that has such rails at your mill, don't you?

29313 A. No. The sales to railroads, in my experience, have been at other points; railroads with which we would do business have bought little from us.

Trial Examiner Norwood: Let's read that question again, and see if you cannot give a direct answer.

(Question read.)

Trial Examiner Norwood: Now, is it true or is it not true?

The Witness: I do not recollect that such railroads have bought any from us, in my experience.

Trial Examiner Norwood: Well, how would you quote them?

The Witness: We would quote them with their line as our destination.

By Mr. MacIntyre:

Q. That is, f.o.b. rails at your mill?

A. No, I do not recall that we have sold anybody that has rails in our mill. I sold very little cement to any railroads in my term of office there.

Q. These announcements of your policy that were offered into evidence by Respondents' Counsel here show that you do quote, or it is your policy to quote railroads f.o.b. rails at your mill; that is, on the rails that do

29314 come to your mill, don't they?

A. No, I do not believe so.

Q. Well, isn't that your policy?

A. Well, you asked me had I sold.

Q. I am asking you now what your policy is with respect to quoting.

A. We sell railroads direct, I think our policy includes only that.

Q. And not only direct but f.o.b. their rails at your mill; that is, either their rails or on cars at rails—at their rails?

A. Are you referring to that published policy there?

Q. Your published policy? Well, your policy, irrespective of whether it is published or not. I am asking you now what your policy is.

A. Well, the policy is to sell the railroad at the junction reaching their line.

Q. And is that line at your mill, would be f.o.b. your mill?

A. Yes.

Q. And that is true whether or not the cement is to be used by the railroad at one point or another; isn't that correct?

A. Yes, sir.

Q. In that respect you are willing and do quote the railroads differently from the U. S. Government, in offering to sell cement; isn't that the case?

29315 A. No, I do not think that is the case.

Q. Well, the record will show what the situation is.

I believe you told Mr. Withrow that your soliciting and selling territory included two-thirds of the State of Ohio, approximately two-thirds.

Will you tell us what portion of the State is included in the third you excluded?

A. Yes. You asked me the question what territory do we solicit in Ohio.

Q. Yes.

Mr. Withrow: Your Honor, I would like to object to that question since it misstates the record. On page 28735, where the witness said that two-thirds of the cement which he shipped was consumed in Ohio, and, of course, that is entirely different from what Mr. MacIntyre now states he stated; that he sold a large part of Ohio, nearly all of Indiana, about half of Kentucky, nearby points in West Virginia and Illinois.

Now, I think he misstated the record.

Mr. MacIntyre: I thank him for clearing me up on that. I did misunderstand his question.

By Mr. MacIntyre:

Q. So, now, will you tell us, Mr. Warren, just what part of Ohio you do sell and ship into; that is, solicit and sell and ship into?

29316 A. We have customers in nearly all parts of Ohio excepting the extreme northeast—more distant points to the northeast corner.

Q. Cleveland,—do you have customers?

A. Yes.

Q. Zanesville, Ohio?

A. I believe we have, infrequent.

Q. Portsmouth, Ohio?

A. Portsmouth.

Q. Ironton, Ohio?

A. I do not know whether we sell anyone there or not. We may have sold a small quantity there.

Q. Louisville, Ky.?

A. Yes.

Q. Cairo, Ill.?

A. I do not recall any since I have been around at Cairo.

Q. Huntington, W. Va.?

A. I think some there.

Q. Toledo, Ohio?

A. Toledo, yes.

Q. Indianapolis?—

A. Yes.

Q. —Indiana.
South Bend, Ind.?

A. South Bend; yes, sir.

29317 Q. Have you noted at any time, Mr. Warren, whether your prices in sales to your customers in those locations that we have just mentioned were lower than the prices quoted there by your competitors?

A. No, I have not.

Q. Have you noted whether or not that the competitors who sell, who quote prices to your customers and to other dealers in Dayton, Ohio, are lower than the prices that are quoted by you?

A. The quotations that we know about are sometimes lower.

Q. Cite some instances.

A. Are lower when a price change occurs. I say I have seen lower price quotations than our prices in several of those points.

Q. At a time of change, you mean?

A. Yes, sir.

29318 Q. Can you tell us whether or not, Mr. Warren, in Dayton, Ohio, you have noticed prices quoted by your competitors to your customers and to their customers in that market as being different than the prices quoted by you in that market except at the moment of the price change?

A. The reason I am hesitating, that seems to accord with my testimony that we, when we follow a price change, that we base it on the quotations that we find.

Q. Back on the same?

A. Yes.

Q. And you do not know whether except as to the difference occurring at the time of the price change of any differences in the prices of yours and your competitors?

A. Well, a secret change is hard to be sure of, but other than that the published quotation gives you a chance to meet it if you desire.

Q. Can you cite any instances where you have found prices different in Dayton, secret or otherwise, other than just momentarily, at the time of the price change, Mr. Warren?

A. Customers have said they had better prices.

Q. But you knew of no different prices other than what someone told you there; that is, in the way of a buyer telling you he had different ones?

A. That would be our only source; yes, sir.

Q. And you made no move to meet it, to make any changes in your prices on the basis of being told that

29319 by your competitors?

A. Not an occasional remark or attempt on the part of the buyer to lower our price because we sell a great many up there.

Q. You had to be convinced that a price change had taken place by having some representative of your company see quotations, that is, printed quotations that had been put out by your competitors before you made any differences in your quoted price; isn't that true, Mr. Warren?

A. Well, my opinion of the veracity of the source of the information differs with different people, but I do not care to authorize the salesman in the interest of securing an order to take unto himself the responsibility of a price change particularly in a neighborhood where we are selling a number of different people, and will guarantee to them no discrimination in our practice or policy.

Q. And you require under such circumstances the printed quotations of your competitors before you are willing to make any change yourself?

A. That has been my practice; yes, sir.

Q. That is, you got to—it has got to be confirmed, anything you know about a price change has got to be so confirmed before you make a move; isn't that correct?

A. Confirmed?

Q. By?

A. I would want confirmation of—I do a great

29320 deal of buying myself.

Q. That is true even if you had been told that a price change was occurring you would still want that confirmation?

A. Well, there are sources that you take someone's word for it.

Q. Well, in most instances you would still———

A. Over the telephone; I have customers who I am sure could report to me by telephone that they had quotations that I would be perfectly willing to believe, who in turn shipped a car that day, asking if I care to meet it.

Q. If a competitor of yours, a salesman of a competitor of yours should tell you that they were going to make a price change you would not rely absolutely on that, you would want confirmation before you made any move to

meet a price change from your competitor to see that he had actually quoted, wouldn't you?

Mr. Withrow: Your Honor, we object to that question. It is purely hypothetical. There is no evidence in the record to show that a salesman of a competitor ever talked with this witness. I think we ought to lay the proper foundation before a hypothetical question is asked.

Trial Examiner Norwood: The objection is overruled.

Mr. MacIntyre: Read the question.

(Question read.)

A. No competitor's salesman has ever talked to me.

29321 By Mr. MacIntyre:

Q. I am asking you, though, that in case of information coming to you from your competitors concerning contemplated price change, and as to the expected date of the price change, you would not go out on that day and make a price change yourself, you would wait until you had seen and had the information you had thus received confirmed by quotations of that company and other companies, wouldn't you?

Mr. Withrow: Your Honor, this question is if something happened which the witness has testified never had happened, what would you do?

Trial Examiner Norwood: I have ruled on the very point Counsel is making.

Let him answer the question.

Mr. MacIntyre: Read the question, please.

(Question read.)

A. No, I had no contact with my competitors on price changes. The only information I secure on that is from our customers.

By Mr. MacIntyre:

Q. Well, you need confirmation of any information you do receive by seeing their printed quotations before you make any move to openly meet it?

29322 A. I have made some exceptions to the—

By Mr. MacIntyre:

Q. To your practice?

A. To the case of the man ordering a car whom I believed had a quotation, but I am not quick to change quotations on rumor or attempt of a buyer to secure a preferential price.

Q. But the proposition I have stated generally holds, with a few exceptions?

A. Confirmation, yes.

Q. Now, Mr. Warren, can you cite any instance of price quotation in territories in which you now quote where the quotations of your company,—of your competitors,—are not the equivalent of some basing-point price or
29323 basing-point figure, as you may care to term it, plus the commercial rail freight as appears in The Cement Institute freight rate books from such basing point to the destination and the lowest combinations of such factors?

Mr. Withrow: Your Honor, we object to that question. It contains several questions in one, and if Mr. MacIntyre would divide the question up we have no objection. He has got what this company does and what all his competitors do in one question. I think it would be proper to divide them.

Trial Examiner Norwood: The objection is overruled.

Mr. MacIntyre: I am asking if he can cite any instance where those circumstances do not apply.

Trial Examiner Norwood: All right. The objection is overruled.

Answer the question.

A. I can cite such instances where those circumstances do not apply.

By Mr. MacIntyre:

Q. Where?

A. A few points in Kentucky.

Q. Where are those?

A. That I recall, in Kenton, and Campbell, and Boone Counties, and in Hamilton County, Ohio, a few points in Claremont County, and I recall of such cases, but do
29324 not recall the exact localities at this time.

Q. You would say that in all the other territory that has been outlined which you quoted would be within the circumstances I have outlined, other than those exceptions you have given?

A. No; there have been others, as I said, but the localities do not come to my mind immediately.

Q. Well, it is generally the case, isn't it?

A. It is more often the case than not.

Q. And as to these exceptions that you have cited, such

as Hamilton County, points in Hamilton County, they are generally recognized—that is, well recognized as so-called arbitrary or special pricing points, aren't they?

Mr. Withrow: Your Honor, we object to that as incompetent, irrelevant, and immaterial, and as being indefinite, well recognized by whom?

Mr. MacIntyre: Oh, I meant by this company and his competitors.

Trial Examiner Norwood: The objection is overruled.

Mr. MacIntyre: Particularly by his company.

Mr. Withrow: That is again two questions. I want to know whether it is his company or his competitors he is asking about.

Trial Examiner Norwood: The objection is overruled. Answer the question.

29325 A. My knowledge of that is from having quoted points where our price was higher than the customers there had been quoted, and having revised our prices to meet the lower quotations.

By Mr. MacIntyre:

Q. Well, you just know, then, that in those particular points they had no relationship to basing-point price plus commercial rail freight in those particular instances; is that correct?

A. They did not.

Trial Examiner Norwood: I think he told us that on direct, just those particulars, didn't he?

Mr. Withrow: I think we have been over this with this witness about four or five times right now.

Trial Examiner Norwood: No, I hardly think so, on cross.

By Mr. MacIntyre:

Q. Osborn is located in Green County, Ohio, isn't it?

A. Green County.

Q. And what county is Dayton located in?

A. Montgomery.

Q. Montgomery?

A. Yes.

Q. And Cincinnati is in Hamilton?

A. Hamilton County.

Q. And Hamilton adjoins both Green and Montgomery; is that correct?

29326 A. No, there are two or three intervening counties there.

Q. Name them, please.

A. Warren County and Butler County. It depends on how you go.

Q. Well, take Warren, Butler, Hamilton, Montgomery and Green, include all the territory in the triangle of Dayton, Osborn, Wells,—yes, Dayton, Osborn, and Cincinnati, wouldn't it?

A. Green is the northern one, and Hamilton is the southern. They lie in that north-and-south direction.

Q. Well, in following an explanation that you made to Mr. Withrow that home consumption of cement is not sufficient to use all that you are able to produce, wouldn't you say that that entire territory that we have just outlined has no consumptive demand up to or equal to the production of your plant and the Wabash plant at Osborn?

A. There are no segregations of consumption figures by the Bureau of Mines, or any other sources that I know that subdivide the smaller units than State.

Q. Well, aren't you satisfied from your experience, Mr. Warren, that your plant and the Wabash plant located at Osborn could more than supply all the cement that is required for consumption in that area that I have outlined?

A. Oh, with no other cements?

Q. Coming in.

29327 A. Oh, I don't think the demand in that area is anywhere near the po ibilities of supply by those two plants, no.

Q. It could even take that territory and include Columbus and still have more than consumption would require, wouldn't it?

A. Well, not knowing what the facts are there, it would be only a guess.

Q. I am speaking from your experience, your opinion on your experience.

A. Some dull years it would not be hard to guess that that would be true; as to over a period of time it would be a guess.

Q. Well, do you know of any year that your plant, though, and the Wabash plant at Osborn could not have supplied that territory that I have just outlined?

A. I do not know.

Q. Do you know of any year that it could not have?

A. I do not know the requirements at the peak years in that territory.

Q. Well, in so far as you have known them, from your experience, would you say, or would you be willing to say now that the two plants at Osborn could not have supplied and more than supplied all that territory?

A. No, I would have to guess. I have no segregation of the amounts shipped there other than our own.

Q. Well, what is your opinion based on your experience?

A. Well, I think I told you that I am guessing, that it would be within the supply.

29328 Q. Within the productive capacity of those two plants?

A. Yes.

Q. In response to a question Mr. Withrow put to you, you stated that you had had the so-called Clark-Burns' questionnaires prepared in the offices of your company for transmittal to them. They are in the record as Commission's Exhibits 970-2-V, or at least parts of them, and 970-3-H. He referred to those, and I believe your answer was that you had had them prepared in your office, although you did not prepare them yourself.

A. That's right, yes.

Q. You did transmit them?

A. I transmitted them, yes.

Q. Did you have any reason to believe at the time that they were transmitted that they did not reflect the thought of your company as to the facts and other matters set forth in them?

A. As I remember them, they were largely statistical information that was— Although I don't remember very well anything else, it was transposed from shipment records, or—that you answer these questions.

Q. And statements of policy of the company?

A. Well, not actually having done the work, my memory isn't very clear on all that that included; but it did include the figures and the practice, as I recall, over some preceding years.

29329 Q. Well, do you know now, and did you know then, any reason why the terms "basing prices"—"base prices," and "basing-point prices," and "basing points," as used in the answer to that questionnaire, should not be used?

A. I don't recall—I don't know—I don't recall that that covered any matters of policy.

Q. Well, those terms, as used in the questionnaire, you know of no reason, or did know of no reason, at that time, why they should not be used, did you?

A. I don't recall going over it; no, sir.

Q. And, with respect to the reason for the policy of discontinuing the trucking of cement, you knew of no reason at that time as to why the statement contained in that questionnaire, as is shown by Commission's Exhibit 970-2-V: "Delivery to proper destination and variance in trucking charges could not be controlled," should not have gone in the questionnaire, do you?

29331 A. I gave the questionnaire to a responsible clerk to secure the information.

Now, I wouldn't make such a statement as that without being definite as to what it means, and, from my knowledge, as I testified here, my limited knowledge of the effects of trucking, that would have to be amplified.

By Mr. MacIntyre:

Q. Who was the responsible man connected with your company that did fill in the questionnaire?

A. Mr. Noland.

Q. Mr. Noland?

A. Yes.

29332 Q. And he is the man who has written so many of these documents that have been offered by Respondents' Counsel?

A. Sales correspondence there, yes.

Q. And handled sales matters for your company for quite a number of years, hasn't he?

A. Yes.

Q. Some sort of a sales supervisor, is he?

A. He is a correspondent in the sales office, and sales office manager, employs stenographers and handles all clerical and correspondence work that he can.

Q. Do you know whether or not he had that position during the years 1929 and 1930 and 1931, 1932—he was connected with the company during those years, wasn't he?

A. He was in the department, whether his responsibilities were the same I question.

Q. But he knew of the policies?—

A. But he did work in that department.

Q. He knew of the policies of the company as of those periods?

A. Well, how much he knew of the policies there is some question in my mind; but he worked there.

Q. You have relied upon his knowledge of the policies of your company, have you not?

A. To some extent.

As he will read the testimony, I will say he is a
29333 good faithful boy.

Q. Coming back to these W. P. A. purchases, Mr. Warren, exhibits have been offered here showing that your policy, as announced during February, 1935, and April, 1935, were to not sell W. P. A., or cement for use on W. P. A. projects direct to the Government.

You recall those exhibits, do you not?

A. It said sell Government direct except for—yes—W. P. A. relief projects.

Q. And you have stated that during recent months, during the last year, that there has been some change in that policy?

A. There have been exceptions to it, or departures from it in a few cases.

Q. And, in those instances, you have sold the Government direct on W. P. A. projects?

A. Yes, sir.

Q. Why did you do that?

A. Competitive, or other companies had bid, last year, in large quantities, taking most of that business. Now, this year, early, similar bids were received from cement companies, and very few bids were offered for dealers, or for small quantities outside. Several of our dealers had told us that they saw no objection to our bidding if we would care to, as they were not getting the business anyway, and didn't see any occasion for us to refrain
29334 from bidding, so, in a few instances, we have bid on those inquiries direct, although they haven't bought very much since. The large quantity purchases seem to have covered the most of the requirements.

Q. The reason for the difference in your policy during 1935 in that respect—during 1935 and 1938, then, has been that during 1935 the dealers told you that they didn't want you to sell such work; that is, direct; whereas, you have found that because your competitors were selling,—or some of your competitors were selling direct, during 1938 and 1939, and your dealers expressing a willingness

for you to go ahead and sell them direct, you say,—is that the difference?—

A. No.

Q. —giving rise to your reason?

A. No, that's only partly correct.

Q. What is the other reason?

A. Well, the dealers today, I think, feel as they did before, about that business, and how it should be sold—

Q. But they simply express themselves differently to you?

A. Not very many are involved there, because very few inquiries have come out.

29336 Q. Would you say, Mr. Warren, that you do not learn of freight rate changes except as they are reflected in price quotations of your competitors picked up by your salesmen?

A. No, I don't think—I don't think price quotations necessarily reflect freight changes—changes in freight rates are generally published through pamphlets, or circulars, mailed us by either railroads or Interstate Commerce Commission.

Q. And the—

A. Supplements—

Q. And The Cement Institute?

A. The Cement Institute.

Q. And you do get those at times before you note any reflection of those changes in price quotations of competitors, do you not?

A. Oh, yes, yes, that is one source. The freight agent advises us if we incorrectly bill the freight rate, where he knows it is different.

Q. And as soon as you have ascertained that your competitors have reflected such freight rate changes in their delivered price quotations, you do likewise?

29337 A. Well, I have never segregated the subject in just that form. Wherever we follow a price change I have described how that's been done. You don't want me to go over that again?

Q. I know, but I would like for you to answer the question I have asked.

Trial Examiner Norwood: Read it.

Mr. Withrow: He has answered the question, Your Honor. He said he did not segregate price changes that way. It is a complete answer to Mr. MacIntyre's question.

Mr. MacIntyre: No, it is not an answer.

I ask that it be read back to him.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Read the answer.

(Last answer read.)

Trial Examiner Norwood: Now, answer that question as to whether or not when you discover that, and discover that a price reflects something, do you figure it back to see whether it reflects a freight change, or something else?

The Witness: There have been freight changes that were not followed by broadcast of delivered price quotations.

Trial Examiner Norwood: I see.

Mr. MacIntyre: I submit that I still haven't an answer to the question, that is, as to where it is re-
29338 flected, doesn't he also reflect it in his quotations in the same manner that his competitors have.

I would like for you to read the question back that I have put.

Trial Examiner Norwood: I think it is a simple question.

Can you answer it?

The Witness: I am trying to answer it, sir, to the best of my knowledge.

There have been freight rate changes which have not reflected—or which we have found have not been followed by changes in delivered price. Now, when we find delivered price changes, and we follow them, we follow them regardless of the segregation of the items, it might reflect them in some cases, and might not.

29341 GEORGE E. WARREN thereupon resumed the stand and testified further as follows:

Cross-Examination by Mr. MacIntyre (Continued).

29356 Q. Do you know of any basing-point price
29357 change that you can speak of of your own knowledge that has occurred since 1935, other than that one at Cleveland, Ohio, that I spoke about, January, 1936?

A. Well, our prices have reflected several changes.

Q. In basing-point prices?

A. Well, I don't—I don't figure basing-point prices, I figured delivered prices, as many as we can get the quotations, and then broadcast our quotations in the belief that general change has been made with some mill, or other mills as figuring points, on the evidence shown.

Q. Well, it is those figuring points, all of the figuring there that I am talking about.

A. I think those figuring points have changed, and—

Q. Can you cite an instance of one having changed other than the one at Cleveland that I told you about, since 1935?

A. I don't know.

Q. I am anxious to have you tell us, if you can, Mr. Warren.

A. As to what point affects the point, I have seen our price cards which have shown changes in price, and therefore must have shown changes in figuring points.

Q. But you don't know that that shows changes in figures at figuring points, do you?

A. Yes, I do.

Q. Well, tell us about them,—tell us which ones, and when.

A. You limited me a little there, and I am trying to think of the dates.

29358 Q. Since 1935, I want you to tell us of any that you know of.

A. Yes, our prices in Southern Ohio have reflected that change in 1935 or 1936, or both.

Q. In what figuring point or base price?

A. Oh, I think—I can be sure of Ironton.

Q. More than once—more than one change down there?

A. Oh, oh, I think so, but I am not very accurate on that.

29360 Q. You have told Mr. Withrow that you have received benefits from the use of the freight rate books of The Cement Institute. Will you please let us know what those benefits are?

A. Well, my belief is that the freight rate book is—with the freight rates posted, tabulated as they are, represents a saving to our company in not requiring us to compile the same information.

Q. For what purpose?

A. For billing our freight.

Q. Do you mean to testify now, Mr. Warren, that the freight rates that appear on the pages of The Cement Institute freight rate books are used by your shipping clerks, and your freight rate experts, in setting forth the freight to be charged on your invoices—

29361 A. Yes.

Q. —and in your bills-of-lading?

A. Yes, sir; except where notice has been received of a change of a freight rate, in which case they would use the changed rate.

Q. You know, don't you, that those rates are for minimum cars that appear in the freight rate books of The Cement Institute?

A. Well, the tariffs—the tariffs provide what the minimum weights of the cars are—

Q. Yes.

A. —And our—

Q. But the freight rate books of The Cement Institute do show those, do they?

A. We seldom ship less than the minimum required in the tariff.

Q. Yes.

A. Base our minimum sale on an amount that's equal to or in excess of the minimum carload requirements.

Q. Which is the 132 barrels?

A. Yes.

Q. What about the 300-barrel cars, and the 250-barrel cars that you ship? Do you mean to tell us here that your shipping clerks use a freight rate out of The Cement Institute freight books in calculating the rate per hun-

29362 dred pounds on such cars as those,—is that your testimony?

A. Yes.

Q. You do not go to the railroad tariffs for that information?

A. Well, the rate on cement is not—is not changed with the size of the cars, unless it is below the minimum.

Q. That is, not even for an 80,000-car, it does not change?

A. I never heard that it did; no, sir.

Q. And irrespective of what route the cement is to be shipped over, you take the freight rate out of the freight rate book—or your clerks do?

A. Well, the route—the route specified by the railroad has to be followed, to get that rate, sure.

Q. Yes.

A. We determine the—

Q. If that rate differs then, as specified in The Cement Institute freight rate book,—you use The Cement Institute book, your shipping department does, in shipping?

A. Oh, I don't know. I don't know they differ, because we reserve the privilege in shipping of determining the route by which the shipment will reach the purchaser.

Q. If, however, you find that the route that you must necessarily use calls for a rate different than the one in The Cement Institute freight rate book, you nevertheless use it?

A. Oh, we would have to be—

29363 If we use a different route we would have to investigate what the charges would be by consultation of the railroad tariff, or if we couldn't find it by inquiry, from a freight agent.

Q. Do you know how many instances that you have had to do that, or that your shipping department had to do that?

A. Oh, I don't remember of it; I don't remember of it ever having been called to my attention, that we had shipped by— Well, I do remember this, that I had a discussion about that due to what I thought was a rather delayed shipment, asked if a shipment could not be speeded up, it seemed to me it went by a roundabout way, and that was the occasion on which this matter was explained to me, the shipment went around the length of a triangle instead of across the hypotenuse.

Q. Now, you take the rates, as I understand it, from The Cement Institute freight rate book, you place them on these cards, such as Respondents' Exhibit 1743 (indicating), and from those cards you copy them onto further shipping papers; is that correct?

A. Yes, sir.

Q. How much more trouble is that to people in your organization than would be the case to copy them directly from previous records of shipping papers, than going through all of this—

A. Why, I think it would be—I think it would be much

29364 more—a much more tedious job, although it could be accomplished by reviewing all of the tariffs, and putting them into tabular form for similar reference.

Q. Well, as it stands now, you have about three sets of records with freight rates, don't you?

A. Oh, I don't know; I wouldn't say that.

Q. Your invoices to all the towns, carrying freight rates to all of your customers—

A. Well—

Q. —the freight rates in Cement Institute freight rate books and the official tariffs, all in your organization, don't you?

A. I, I—yes.

Q. And the fourth record, which is the card here, such as Respondents' Exhibit 1743 (indicating),—you have four sets of records, don't you? Is that true?

A. The freight rate would appear in those; I wouldn't call them four sets of records, no.

Q. Well, if you have all of the freight rates that apply, it is a set, isn't it?

A. Of course, it is a matter of record what we do with the freight to the customers; it is on the invoice.

Q. You never figured the cost of reporting and recording all of this information, have you, Mr. Warren?

A. No, I haven't figured the cost.

Q. You are not able to say, then, at this time, 29365 whether or not it exceeds the cost of taking freight rates direct from the tariffs?

A. Oh, it is my opinion that that would cost considerably more.

Q. That is a mere opinion of yours, though, isn't it?

A. Yes.

Q. I believe you testified on direct that wherever you do use a figure at a figuring point, and apply to that your rate out of your Cement Institute freight rate book to arrive at a delivered price to quote, then, to that extent you do use The Cement Institute freight rate books for quotation purposes?

Mr. Withrow: Could I have that question read? I did not quite understand it.

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

By Mr. MacIntyre:

Q. Isn't that your testimony, Mr. Warren?

A. We use the freight rate books for all purposes—

Q. Well, don't you use it for that purpose, in that manner?

A. Well, I—

Q. Isn't that your testimony on direct?

Mr. Withrow: Let him finish his answer.

A. There is so much in the question that I have gotten a little confused there.

Could I have the question read again, please?

29366 Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. We use those rates except as I have specified where we have notice of the change in the freight rate, or in the route.

By Mr. MacIntyre:

Q. In the manner that I have outlined?

A. Yes.

Q. Well, if you and your competitors use them in like manner, for that purpose, is there any chance, in your opinion, of getting different prices at different delivered points?

A. We have found that our quotation at destinations has varied.

29367 By Mr. MacIntyre:

Q. Well, I am talking about, though, the freight rate books as used under the circumstances.

A. You asked if there was any chance—

Q. As used under the circumstances.

A. If there is any chance—

Trial Examiner Norwood: Answer.

A. I will answer that by saying "Yes."

By Mr. MacIntyre:

Q. Now, coming back to this use of the freight rate books by your shipping department, which you testified, that they used them for shipping purposes,—just how much of such use of the freight rate books can you testify about, to your own knowledge, as to the details of such use, now, Mr. Warren?

A. I have asked the shipping department to give me freight rate information, and have seen them refer to the Cement Institute books for the information.

Q. Well, that is information you were asking them for, for their use?

A. You asked me what I could tell from my own knowledge. I was trying to be within that limitation.

Q. Yes. You saw them taking information you had asked for out of The Cement Institute's freight rate book?

A. Yes.

29368 Q. What did you use that information for?

A. I don't recall. I wanted to know the freight rate from Osborn to some point.

Q. For use in quoting a price, or in connection with a price that had been quoted?

A. I don't recall what I had used it for. I was thinking of your question, as to what I had actually seen them do.

Q. You did not use that to put on the shipping paper, yourself, did you, or to have someone else put those on shipping papers?

A. I don't remember.

Q. Did you ever actually see any one in your shipping department, as a rule, and as a practice, use The Cement Institute freight rate in copying from them onto the billing papers and shipping papers?

A. I have seen him copy his freight rates from his file cards.

Q. From the file cards?

A. From the file cards. I do not know—I am not at his desk much and I do not know that I have seen the thing you ask me about. I have seen—

Q. So when you testified to the use in connection with shipping purposes, you were not testifying from your own knowledge, were you, only what you had heard?

A. Well, I had examined the methods there frequently enough to say that is within my own knowledge.

Q. Did you ever see them put the rates on cards?

29369 A. Well, I was not actually present when that was done that I recall, no.

Q. You do not know where they came from?

A. Well, Mr. MacIntyre, I would advise myself on the procedure to say that I do, yes, but I was not there when the copying was done. My office is in another part of the building, and I do not do that myself, so—

Q. Well, can you testify now, Mr. Warren, from your own knowledge that those clerks who copy those rates onto your cards do not check the same with official tariffs as they copy them—that is, the railroad tariff?

A. No, they do not do that, no.

Q. Can you speak of your own knowledge—

A. Yes.

Q. —in saying that they do not?

A. Yes, because I have inquired of that myself.

Q. And when did you inquire on that?

A. Well, soon after I came and found that there was an Institute freight rate book, and that we paid for it, and I wished to acquaint myself with whether or not it was a charge that we could, or an expense that we could save,—a charge that we could eliminate.

Q. Did you inquire of them as to where they get the routing information that they put on to the invoices and other shipping papers, billing papers?

29370 A. Yes.

Q. What did they tell you?

A. From the railroad tariff.

Q. They use the railroad tariffs, then?

A. The railroad tariff shows the routing.

Q. And they put the routing on every invoice, don't they, and car numbers?

A. Yes.

Q. And in that respect they do check every—check the official tariffs in filling out every invoice?

A. No, no, no.

Q. Why don't they?

A. We do not ship enough points to make that necessary. People know how the shipment goes from Osborn to Zenia or Osborn to Springfield, the same as you would know where you take the station at New York or Chicago.

Q. Well, that is a couple points. How many points do you have—how many points do you ship to?

A. We ship to four or five hundred, or more.

Q. So out of two or three you know they do not check the routing information?

A. They do not check from the tariffs their routing; no, sir.

Q. You told us two or three that you know they do not.

A. Yes.

29371 Q. Out of the four or five hundred.

A. Yes.

Q. On page 28992 of the record, at page 11, Mr. Withrow asked you why you did not reduce your price 15 per cent or part of 15 percent in connection with your placing of your bids on the Tygart River project,—do you remember?

A. Yes, sir.

Q. And your answer was that the price was too low even then; do you recall that?

A. I recall that, yes.

Q. Is that the only reason why you did not make some effort to quote just a fraction of a cent or more below those prices that you knew your competitors had filed for use on that project?

A. That is the only reason.

Q. In that connection, Mr. Warren, I would like to call your attention to Respondents' Exhibit 1713-H,—it is a rider that was attached to your bid on that project. It reads, "Price will be adjusted by the amount necessary to equalize any change in price due to freight rate adjustment from any mill receiving an allocation of business under this proposal."

Well, when you attached that rider to your bid you expressed a willingness to take a lower price than the one bid if it became necessary, didn't you, if your competitors made lower prices?

29372 A. Now, is this the bid that I did make, or the subsequent—that is the one we bid on, I believe.

Q. Yes. It carries your signature.

A. Yes.

Q. You would have taken lower prices if your competitors had taken them in that particular instance?

A. Well, this information was on file, you see, at this time; this was at the time when prices were on file under the N.R.A., so that I was meeting there what those filings provided.

Q. And pursuant to that provision you would have taken a lower price than the one you bid if your competitors had been found taking a lower price than the one you bid immediately after this price was bid, wouldn't you?

A. Well, that would permit me to do it there, yes.

Q. Although you were not willing to do it in the first instance?

A. Well, the probabilities of lower freight rate at that time did not seem very great.

Q. On this question of diversions of shipments in transit, I believe you told Mr. Withrow that you knew of objections of dealers to diversions. Can you cite us now the name of any dealer who opposed diversion in transit and

give us a date on which he voiced objections to you to that practice?

A. Well, that is some time ago, in a limited number of instances; that is asking a little too much of me. I
29373 do not remember the dates.

Q. If you had any such objections, can you say that they were confined to or came from dealers who were doing business in a town in which you had more than one dealer and into which shipments were being diverted?

A. My action on that was made up of information which I, myself, received, and considerable information transmitted to me by several of our salesmen, and it is my recollection that most of it came from a part of the country where we have for the most part only one dealer in most of the towns in which we solicit.

Q. Do you have any contract with any dealer, or do you have any understanding at the time you make a sale to any dealer that you will not sell any other dealer in that town?

A. We do not have such contracts, no.

Q. In other words, he is not an exclusive dealer by contract?

A. Well, frequently that point is discussed with the dealer, and in many instances we, for our own best interest, confine our solicitation to one dealer in a given locality.

Q. But you do not legally obligate yourselves to that dealer not to sell to other dealers?

A. Well, our sales to him are subject to discontinuance or sell someone else if we desire. It is purely a matter of self-interest and self-defense.

Trial Examiner Norwood: As long as they give
29374 you satisfactory business you will have the account with them; is that the way of it?

A. Sometimes—that is practically so. Sometimes it is ttempting to go to two or more accounts, being that you re selling more people the salesman may be tempted to add ew customers, but he may be dividing his efforts, and in e end we secure less returns than if we concentrated our forts through one resale outlet. Conditions vary in that spect.

r Mr. MacIntyre:

Q. Mr. Warren, you told Mr. Withrow that the unit of le is by carlot; is that correct?

A. Yes, sir.

Q. I believe you also told him that while that was a minimum car, 132 barrels—

A. Yes, sir.

Q. I believe you also told him that from the Victorville plant of the Southwestern Company trucking is permitted.

A. Yes, sir.

Q. Do they truck in carload lots of 132 barrels, or more, or what do you know about that?

A. The quantity is something less than that.

Q. The unit of sale, then, in all instances by your company is not carlot of 132 barrels.

A. Not the carload; no, sir.

29375 Q. In response to some questions you told Mr. Withrow that you posted prices in your books of account showing the delivered price,

A. Yes, sir.

Q. And also the freight allowance?

A. Freight allowance, yes.

Q. Do you at the time of closing those books make a computation of the total of those amounts that are so carried?

A. I do not close the books, and my impression is that we do, but I have not closed them. I have seen statements of our gross sales over years, which must have come from the books, but I did not personally take them.

Q. Gross sale, including freight?

A. Yes, sir.

Q. Well, for what years?

A. Well, for parts of years and entire years in the past. I think perhaps in all, every year.

Q. Is it done regularly with each customer; I mean, for each customer?

A. Oh, I don't know how to interpret that. You asked me if we take off the gross sales of our books.

Q. Yes, for all customers at all times; that is at the end of the year, when you close your books at the end of the year, for all customers do you know with respect to that customer—that is, any particular customer?

A. Oh, no, that is consolidation of gross sales.

29376 Q. Well, do you make such consolidations?

A. Yes.

Q. Regularly?

A. Yes.

Q. For each customer?

A. Oh, no, no; I have not seen any such tabulation as that.

Q. Well, are you able, from your books, at any particular time, to tell for any particular period how much freight allowance was involved in the account of any particular customer?

29378 A. You mean as to whether that is footed up for each sale,—you say at any time?

By Mr. MacIntyre:

Q. No, not for sale, for periods.

A. Well, it could be determined by—it could be determined by examination of the books.

Q. Oh, yes, it could be determined from all of your invoices, but I am asking you now whether not, as a matter of practice, for each customer you do carry totals forward and make determinations of those particular factors?

A. Not that I know of.

Q. In other words, it does not play any part in your settlement of your account with that customer, then,—the totals do not?

A. Well, just a minute, then—pardon me. A good deal of some business is sold at freight prepaid, it cer-

29379 tainly enters into our transaction.

Q. Well, we are talking about freight allowed, now, however, where freight is allowed.

A. Yes.

Q. We are not talking about prepayments. I am talking about the total allowance of freight, if it is not totaled up at the end of the year for a particular customer, or does not play any part in his bill, does it then figure in your settlement of your account with him?

Q. At the end of any particular period.

A. It is more—it enters more in the individual transaction than in the history of what happened before.

29380 Trial Examiner Norwood: It is taken out in every transaction, isn't it?

The Witness: Well, it may be; we hope. We hope he will pay the freight, if he does not reject the car, or something else happens.

By Mr. MacIntyre:

Q. It is not posted in your book, then, as you described to Mr. Withrow for the purpose of settlement of any account between you and your customer?

A. We have sold him at a price, and we have allowed the freight. Now, assuming that he will pay the freight and pay for his cement, but our sale is posted in our book.

Q. Does he pay you the freight?

A. No, on freight collect he pays the railroad.

Q. All of the freight is paid to the railroad in an instance where it is not prepaid?

A. The freight is paid for our account.

Q. Well, now, on this question of him paying the freight for your account, are the goods consigned by you to you at his destination for him to claim for your account, or are they consigned to him in his name at the destination?

A. They are consigned to him at his name at the destination.

Q. And the freight is payable by him in his name to the railroad company; is that correct?

A. Well, it is paid by him for our account, and
29381 he frequently transmits to us his receipted freight bill in part payment of his invoice.

Q. What particular wording in the invoice or in the bill-of-lading informs the railroad company that they are collecting from a customer of yours freight for your account, Mr. Warren?

A. I do not know that wording.

Q. You do not know of any wording that appears in there, do you?

A. Oh, yes, freight collect.

Q. Freight is collect?

A. Yes.

Q. From someone, but what showing is it that it is collected for your account?

A. I can't give you the wording. I am not familiar enough with bills-of-lading to do that.

Q. Now, in these instances where claims are made by customers for d. nage in transit, you have stated that in some instances you permit the customer to forward to you the shipping papers, and that you will file the claim for him; is that correct?

A. Yes, sir.

Q. When those claims are filed for him they are filed in his name against the railroad company by you as his agent, aren't they; they are not filed in your name; isn't that correct?

A. Well, I do not know about that; I do not know how that filing is done. He inspects the shipment and
29382 agrees with the local freight agent as to what the damages were, the labor and property destroyed, and where we can we aid him in getting that settlement.

Q. Any amounts that are collected for the damage are paid over to him?

A. Credited to his account, yes.

Q. Mr. Warren, last Friday there was received in evidence quite a number of—Thursday and Friday there were received in evidence quite a number of printed announcements of dealer policies which had been issued by your competitors.

Do you recall those?

A. The ones that were shown me here?

Q. Yes.

A. Yes, sir.

Q. Yes, Respondents' Exhibits 1746 to 1756, inclusive, and 1759 to 1771, inclusive; do you remember those?

A. Yes, sir.

Q. The first group having been issued in Febru-
29383 ary, 1935, and the second group in April, 1935.

A. Yes.

Q. I believe you testified that you had some discussions with dealers concerning their desires on dealer policies, at about that time?

A. Yes.

Q. Now, I will ask you whether or not you had any discussion whatever with any of your competitors concerning dealer policies, or attended any meetings at which any of your competitors were in attendance, where dealer policies of that character were discussed or mentioned?

A. None whatever.

Q. The record shows that conferences were held in Chicago during the early part of 1935, and before the April announcements, which were attended by some manufacturers' representatives and a number of dealers representing dealer associations, at which time these were discussed.

You state that you were not there?

A. I don't—no, I didn't attend any such meetings, and I don't recall knowing of any such meetings.

Q. You were a member of The Cement Institute, though, at that time, were you not?

A. Yes, sir.

Q. That is, representing your company and its membership in the Institute?

29384 A. Yes.

Q. You knew at that time that B. H. Raeder was a trustee of The Cement Institute, did you not?

A. He had been a trustee. I can't say—he was chairman of the Code Authority—I don't remember whether he was a trustee; I think he was.

Q. Now, as to the period between the announcements of February, 1935, and the date on which Article XI was dropped from the Code, which, I believe, was early in 1934, that has been described in this case by a representative of some manufacturers as a catch-as-catch-can period, a period in which there was some uncertainty then as to the exact policies of manufacturers,—did you so regard it as a period of catch-as-catch-can—

A. As to our sales to customers?

Q. Sales policies.

A. I recall, I believe that we attempted to sell in accordance with the policy that we were following at the time of the Code, and that we experienced inability to sell certain classes of work in accordance with that—

Q. You are somewhat uncertain as to the exact—

A. I was not uncertain as to what we were doing, but I was uncertain as to—or I was experiencing inability to close some business that I thought we should close or could close.

Q. You were uncertain as to the exact policies of
29385 your competitors at that time, were you not?

A. Yes.

Q. In that respect you would describe that period as a catch-as-catch-can period?

A. Well, I haven't described it as that. I would describe it as a period when many of our dealers were reporting to us different methods of sales, certain projects.

29386 *Redirect Examination by Mr. Withrow.*

The witness identified Resp. Exs. 1824 through
29387 1829 as trade quotations and correspondence concerning price changes in Ohio. They are from his files and these matters were brought to his attention.

29392 Mr. MacIntyre: Of course, I have not stated all the objection that we have to the pending offer, anyway.

First, that it is not proper at the time; second, it involves papers—the offer does involve papers that contain statements that are hearsay in the manner in which they are now presented to us, some of the papers, the witness does not even know how they came into the possession of his company except by matter of hearsay, to say nothing about the contents of the papers themselves.

29393 Trial Examiner Norwood: I think that you will have to show price changes by people who know something about them in another way than from a letter from these parties here. I do not think you have this in satisfactory shape to have it received in evidence. For the time being I shall sustain the objection and give Counsel a chance to make better identification and explanation of them.

29396 A. T. WOOD, being called as a witness for Respondents and being first duly sworn, testified as follows:

Direct Examination by Mr. Leisure.

I am the general manager of Green Bag Cement Company of West Virginia. I am in charge of sales and am the chief executive officer with regard to that matter and I direct the policies of the company. I have held that position since 1917. Prior to that time I was sales engineer with the Allis-Chalmers Manufacturing Company,

29397 manufacturers of heavy machinery. Green Bag of West Virginia was incorporated in West Virginia and has its main office in Kenova, West Virginia.

The capitalization of Green Bag of West Virginia is $850,000 at the present time. The company has no

29398 branch offices and owns and operates one mill at Kenova, West Virginia; it has no warehouses, silos or other distributing facilities. The company was organized, I believe, in 1915, as Basic Products Company. It took its present name, I believe, in 1931. Since 1927 Green Bag of West Viriginia has been producing cement.

Prior to that time the company manufactured re-

29399 fractories. The company chose the name "Green

Bag Cement Company of West Virginia" because of the following: "the name of the company at that time was Basic Products Company—I thought that the name 'Basic' did not mean anything in lime, or did not mean anything in cement, you cannot connect it. While it was all right in the refractory end of it, I thought, well, there is a fellow that has seen the package, the name don't mean
29400 anything, why, in putting cement on the market, getting a package, the name doesn't mean anything. You call for something, you see the package once, and it attracts your attention, that is what we want to get; and for about 30 days there was an awful lot of thought given, and finally one of the sons of the company who had been let in on it, I think his dad offered him a little surprise to think of something, one day he was there, he said, 'Why not call that Green Bag, Green Bag Cement?' "

The company has operated continuously under one management since 1931. In 1933 I believe that we were in receivership and this lasted for about 14 or 15 months.
29401 We had an office in Pittsburgh and in order to lower our overhead, it was transferred to Kenova. I believe I have been a director of the company since about 1934. I have never been a director of any other company. None of our officers or directors has been an officer or director of any other cement producing company nor is my company affiliated in any way with any other cement manufacturing company.

The quarry which is located at Lawton, Kentucky, about 50 miles away, is the nearest source available to
29402 the company. No change has been made in the quarry location. We have changed materially the methods of operation at the mines, thrown out the old and adding new, more up-to-date equipment. At the plant we have designed a number of changes resulting in a
29403 reduction of cost to the company. The clay section is practically one big item, and in some cases the handling of materials. We figure it is an up-to-date mill. The capacity of the mill is 600,000 barrels and I feel that the company can produce that amount.

Q. Well, now, what is your market territory, Mr. Wood? I mean by that in what territory do you normally solicit your business?

A. West Virginia, some of Ohio, certain sections
29404 of Kentucky, a small part of Virginia, Tennessee, very small, a radius of practically, oh, 150 miles.

Trial Examiner Norwood: Is your company the only Green Bag Cement Company?

The Witness: Of West Virginia.

Trial Examiner Norwood: Is there another Green Bag Company?

The Witness: Green Bag Cement Company of Pennsylvania.

Trial Examiner Norwood: They are not affiliated?

The Witness: No.

By Mr. Leisure:

Q. Well, does it cover the territory of St. Marys, W. Va.?

A. St. Marys is the extreme end of our shipping radius

Q. And what about Ohio? Do you go to Columbus?

A. We reach Columbus, nothing west.

Q. Then, I take it, you reach Cincinnati?

A. Cincinnati.

Q. What about Lexington, Ky.?

A. We take in Lexington, down as far as Knoxville.

Q. Knoxville, Tenn.?

A. Tennessee, and runs east—well, to Bristol, swings you around north and comes back into West Virginia, finally winds up at your starting point, St. Marys.

Q. Do you get into Pennsylvania at all?

29405 A. None at all.

Q. Do you get into Virginia at all?

A. Just a very little.

Q. What about North Carolina, do you get into that?

A. We might hit it a little bit, but, very, very little.

Q. Now, was the territory any different during the period you were operating under receiver?

A. Not quite as large as it is today, the boundaries I gave you are today.

Q. Not quite as large as it is today?

A. When we were in receivership we did not hit Knoxville, Tenn., or Virginia, or the small section of North Carolina. We did hit West Virginia and Ohio and Kentucky.

Q. Those were territories that you abandoned during that period of time, during the receivership?

A. No, but those are the territories which we ship in.

Q. Yes.

A. Then since the receivership was dissolved, why, we reached out a little bit.

Q. Did you make any changes with reference to your sales force during the time that your company was in receivership?

A. We reduced the sales force, I believe, from 7 down to 5.

Q. Do you have any one particular chief market in this territory that you describe to us?

A. Do you mean State or—

29406 Q. Some of the companies have indicated some special place as being a principal market. I am trying to find out whether you sell all over the territory or whether you have one special market.

A. No, all over the territory.

Q. And what competitors do you meet in this territory that you have told us about?

A. Well, we meet Alpha, Superior, Columbia, Universal-Atlas, Speeds, Kosmos, Penn-Dixie, there may be one or two more.

Q. Do you meet Lone Star?

A. Lone Star.

Q. What about Lehigh?

A. Lehigh.

Q. Do you meet Huron?

A. No, we do not meet Huron.

Q. What about Southwestern?

A. Well, in Ohio we meet their competition.

Q. Will you tell us whether or not you sell your cement at delivered prices, Mr. Wood?

A. We do.

Q. Will you tell us whether or not your mill is or is not a basing point?

A. It is not a basing mill.

Q. Has it ever been?

A. Never.

29407 Q. You told us in the beginning that you determined the sales policy. Who determines whether or not your mill will or will not be a base mill, a base mill or non-base mill?

A. I think I have decided that.

Q. What are your reasons,—what is your reason for remaining a non-base mill?

A. Well, it is so near the Ironton base mill it is unnecessary.

Q. How far is it?

A. About 12 miles.

Q. Are there any agreements or understandings or working arrangements that would forbid or prohibit you from establishing a base at your mill if you chose to do so?

A. Absolutely none.

Q. How do you determine the price of your cement at a particular destination, Mr. Wood?

A. Try to meet competition where we find it.

Q. And how do you find it?

A. Through our salesmen advising us of prices as they find them in their travels.

Q. As a non-base mill, do you attempt to be a price leader? Has your company ever issued any price changes?

A. No, sir.

29408 Q. Now, you told us a moment ago, Mr. Wood, that you try to meet competition. Why don't you go below your competitors' prices?

A. Well, we like to make all we can. Cutting prices wouldn't help matters any.

Q. Does your company belong to The Cement Institute?

A. Yes.

Q. How long have you been a member?

A. Oh, since about 1933, I believe.

Q. Without trying to fix the exact date, can you tell us whether or not you joined at the time of the N.R.A. Code?

A. I think we were members during the N.R.A. Code.

Q. Mr. Wood, do you use the freight rate books of The Cement Institute?

A. Occasionally.

Q. What particular books do you take?

A. West Virginia, Ohio, Kentucky, North Carolina, Virginia, and Tennessee.

Q. Do you give copies of these books to your salesmen?

A. They have them, yes.

Q. What use, if any, if you know, does your company make in the sales office of the freight rate books?

9409 A. Just a matter of checking.

By Mr. Leisure:

Q. Do you have a traffic department, Mr. Wood?

A. No, sir.

Q. Have you ever had one?

A. No, sir.

Q. Do you use any conversion tables in connection with these books?

A. Well, we have a system of our own, changing the rates in hundreds to barrels, very simple, typed form under a glass plate, so it is a matter of "rate so much," barrel so much."

Q. Where does that come from? Do you make it up yourself?

A. Make it up ourselves.

Q. Or did you get it from the Institute?

A. Make it up ourselves.

Q. Have you ever bid on any Government invitations, Mr. Wood?

A. No, sir.

Q. I wish to direct your attention to a Commission Exhibit 373-A, B, which indicates that you bid (handing document to witness); will you look at it and tell us whether that is correct or not?

A. Chillicothe, yes, that's one; small proposition.

29410 By Mr. Leisure:

Q. Is that the only one you bid on, as far as you know?

A. That's the only one I recall.

Q. Did you quote the Government directly, Mr. Wood?

A. I think this was sent right through to the U. S. Industrial Reformatory at Chillicothe. I think the bid was direct.

Q. Do you recall whether or not you got the order?

A. We did not.

Q. How did you arrive at your bid price in that instance, Mr. Wood?

A. The price at Chillicothe, the dealer was used.

Q. Did you have a dealer?—

A. Yes, sir.

Q. —at Chillicothe?

A. Yes, sir.

Q. Well, then, did you arrive at your price in the same way or in some different way from the—or the way you arrive at it in ordinary commercial business?

29411 A. The regular way.

Q. Have you got the date there on that exhibit, please?

A. June 12, 1936 (referring to Commission's Exhibit 373-A, B).

Q. Prior to 1936 did your company furnish any cement to any public bodies?

A. Once in a while to the State of West Virginia,—not much,—very small.

Q. You are listed in Commission's Exhibit 1340, Mr. Wood, as having received the Government's invitation 1339; can you tell us whether or not you did receive that invitation to bid (handing document to witness)?

A. Yes, sir; we received it.

Q. Did you bid on it?

A. No, sir; we did not.

Q. Why not, Mr. Wood?

A. Well, it was more of an invitation; as I considered it, it was uncertain as to quantities. We being a very small company we wasn't able to take on anything of this size; finances wouldn't permit us to get in on these things, and we didn't bid.

Q. Has your company ever made any cements of special specifications, Mr. Wood?

A. Nothing whatever.

Q. Now, as to the operation of your mill, have
29412 you been able—or, tell us whether or not you have been able to run your mill the year around without any of the Federal Government business?

A. Yes, sir; barring floods and strikes, and things beyond our control.

29414

Washington, D. C.,
December 19, 1939.

29415 STANLEY M. BOLSTER, being called as a witness for Respondents and being first duly sworn, testified as follows:

Direct Examination by Mr. Withrow.

I am associated with the Aetna Portland Cement
29416 Company as treasurer and secretary and I have held that position since April 1935. I have been an Aetna director for 12 or 15 years. I have never been connected with any other cement company either as a director or an officer. I have a large stock interest in Aetna that came to me as trustee on account of the death of a

stockholder. I am an attorney and I practice law in Boston, Massachusetts. The present officers are Ben W. Calvin, president and general manager, and myself as
29417 treasurer and secretary. Mr. Calvin was elected president this year in July or August, I do not recall which, upon Mr. Johnson's death. Mr. Johnson died in July, 1939.

Up to April, 1935 there were four directors, the two active ones being Franklin R. Johnson and Renny Payne. While I attended occasional directors' meetings they were quite infrequent. The company was really run by Mr. Johnson and Mr. Payne actively. Mr. Payne died in January of 1935. He was treasurer as well as a director of Aetna. I am the trustee of the Payne estate and
29419 I took over whatever stock interest he had. I became treasurer on account of the death of the former treasurer, Mr. Payne. Mr. Johnson, the then president, requested me to become the treasurer and to take a more active part in the concern and since that time I have taken a more active interest in Aetna.

Q. And on taking this interest, in 1935, what did you find to be the condition of the Aetna Company?

29420 A. I found that the profits of the company had been running down hill for several years; that the management, in my opinion, was not satisfactory. I took up the matter with the president, and insisted upon a more thorough audit; upon an investigation of the management and the protection of the stock that I represented.

29422 Q. Mr. Bolster, at that time did you have any occasion to examine the books and records of the company to determine whether or not a profit or loss had resulted from operation, say, from the period from 1932 through 1935?

A. I did.

Q. What did you find?

Trial Examiner Norwood: Well, wait a moment.
29423 He cannot tell us what he found from those books. You would have to bring those books.

By Mr. Withrow:

Q. Mr. Bolster, I show you Respondents' Exhibit 1830-A and B and ask if you can vouch for the correctness of those figures, whether you have ever checked those figures (handing document to witness)?

A. Well, all I can say is that, of course, I have never seen this letter before. I have seen what I think is a copy of it, and, if the copy which I possessed is a true copy of this here, these figures are correct.

Q. Do you happen to have that copy with you that you checked?

(Witness takes papers from pocket and hands to Mr. Withrow.)

Mr. Withrow: I would like to have this paper also marked for identification, Your Honor.

Trial Examiner Norwood: Is that the one the witness produced?

Mr. Withrow: That is right.

Trial Examiner Norwood: It may be marked.

(The document referred to was marked for iden-
29424 tification "Respondents' Exhibit 1831-A and 1831-B.")

By Mr. Withrow:

Q. Mr. Bolster, I hand you Respondents' Exhibit 1831-A and B; is that the copy you referred to as being the one that you checked (handing document to witness)?

A. It is.

Trial Examiner Norwood: What is Respondents' Exhibit 1831-A and B? The witness has not told us yet. Is it a statement taken from the books of the Aetna Company?

The Witness: A letter from Price Waterhouse & Company, directed to the company.

29425 The Witness: Dated May 31, 1939.

Mr. Leisure: It is a statement taken by Price Waterhouse, which he has checked with the original record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

(Mr. Withrow hands document, Respondents' Exhibit 1831-A and B, for identification, to Mr. MacIntyre.)

Trial Examiner Norwood: On the record.

Mr. MacIntyre: May we ask Mr. Bolster a question on voir dire?

Trial Examiner Norwood: Yes.

Examination on Voir-Dire by Mr. MacIntyre.

Q. When was this prepared by Price Waterhouse, Mr. Bolster?

A. I can't answer that. All that I know is that it was sent to me by counsel some time within the last month, I should say.

Q. What counsel are you referring to?

A. Mr. Leisure's office.

Q. Do you know where he got it?

A. No, I do not.

Q. When?

A. Know nothing about it whatever other than that statement.

Q. You know nothing about it other than what
29426 appears on the document, then?

A. I know nothing as to how he got it.

Trial Examiner Norwood: Well, you did not see it until long after Mr. Cree was discharged?

The Witness: Oh, that is correct, Your Honor; this paper.

Trial Examiner Norwood: Yes.

Let him tell us about that circumstance and give us his reasons therefor.

Mr. Withrow: Your Honor, we will, but Counsel for the Commission has repeatedly requested a tabulation in this form of these facts. Now, this witness—this tabulation was prepared by certified public accountants, Price Waterhouse & Company. This witness has been asked to check them with the books and records, and he is the treasurer of this company and he has checked them, and we are now tendering this information to Counsel for the Commission, and at the same time offering it in evidence.

Trial Examiner Norwood: Well, let him complete the voir dire.

By Mr. MacIntyre:

Q. Did you know anything about the auditors' reports that are referred to on the third line of Respondents Exhibit, for identification, 1831-A,—did you see those?

A. Those reports, I think, are in my possession,
29427 or in the possession of the manager at Bay City. I have seen them.

Q. Who made them up?

A. They were made by our then auditors. Frankly, the name is gone from me. It is not our present auditor. Tiffin seems to be one name.

Q. Where are they located?

A. I think in Detroit.

Q. You are not certain as to the name or the location, are you?

A. No. My memory does not go back to that time. This was all before I became active, so far as auditors were concerned, but I have seen the name a great many times. I cannot give you the exact firm name.

Q. So far as you know at this time, this document here, Respondents' Exhibit 1831-A and B, is based in large part upon such reports as made up by those particular people, auditors' reports,—doesn't that appear to be the case as to what you learned?

A. Auditors' reports and copies of federal income tax returns, all of which came from the books of the company.

Q. Well, the auditors' reports are not books of the company, are they?

A. No.

Q. They are reports based on books of the company?

A. Correct.

29428 Q. And this, in turn, is based on the auditors' report?

A. No, it is the exact figures appearing in the auditors' report, because I have had them checked from the auditors' reports, which are in my possession.

Q. As to how correct the auditors' reports are, are you able to state at this time?

A. No, sir.

Q. And you are not certain as to the name of the auditor who prepared the reports?

A. I am not.

Q. Or even as to his exact address?

A. No.

Mr. Macintyre: Your Honor please, in addition to the remoteness to the issue and the irrelevancy to the issue and the immateriality of the document, Respondents' Exhibit 1831-A and B is clearly incompetent; first, on the showing that it is a mere statement by—purportedly by Price Waterhouse & Company, under date of May 31, 1939. On its face it purports to be based in part,—we do not know how much, whether 99 percent or 1 percent,—upon

some auditor's report. The witness has stated that he believes he has seen those auditor's reports. He cannot even vouch for the accuracy and the truth of the auditor's reports. We actually do not know the name of the auditors or the address. It seems to me—

29429 Trial Examiner Norwood: I heard that testimony. Counsel need not go into it at length.

Mr. MacIntyre: Well, for those reasons, we object to the paper as offered.

Trial Examiner Norwood: I think you had better lay your ground for this first, and when you do that I think the most serious objection will appear that this was not something which the witness acted upon.

Mr. Leisure: Not this paper but these facts which have been gathered together.

Trial Examiner Norwood: Let him tell us. I think the objection is good.

Mr. Leisure: He acted on the books of the company.

Trial Examiner Norwood: I think it is once or twice removed from anything that I could receive in the record as evidence, but this witness may go ahead and tell us what conditions he found and what he did about it.

By Mr. Withrow:

Q. Mr. Bolster, could you tell us whether or not you found in the books and records and audits of your company that in 1932 there was a loss of $263,519.53?

Mr. MacIntyre: Just a moment. We object to the question; the witness is now looking at the rejected paper apparently for the purpose of refreshing his memory and recollection, what he has already stated he cannot

29430 vouch for the accuracy of the paper.

Trial Examiner Norwood: Mr. Witness, please put that paper away; do not refer to that paper.

Mr. Withrow: Your Honor, he said he checked these figures with the books and records and audit reports of this company; certainly any pencil memorandum he made to the effect, in checking those records, he certainly could use to testify from.

Mr. MacIntyre: The witness has said he checked this paper with the auditor's report, and he cannot vouch for the accuracy of the auditor's reports. That is his testimony.

Trial Examiner Norwood: Yes. I do not think he can use that to refresh his memory. He can tell us the condi-

tions he found generally and tell us whether or not he had anything to do with discharging this man and give us his reasons.

By Mr. Withrow:

Q. Do I understand, Mr. Bolster, that you checked with the books and auditor's reports, or had checked in your supervision Respondents' Exhibit 1831-A and B?

A. I did.

Q. So that you can vouch for the correctness of the figures?

A. I can as to the comparison between that exhibit and the books and auditor's reports.

29431 Mr. Withrow: Your Honor, I would like to have the witness refresh his recollection and testify to those figures, and I believe he is entitled to do so, having checked the books and records.

Trial Examiner Norwood: He was in charge of those books and continually verified them; is that correct, Mr. Witness?

The Witness: That is correct.

Trial Examiner Norwood: Well, I think that he may refresh his recollection from it. Let him have it.

(Mr. Withrow hands Exhibit 1831-A and B to the witness.)

Mr. Paulson: Would Your Honor receive in this case the auditor's report without requiring Counsel to tender the office records for our checking? That is what you would be doing, as this witness said he never looked at the book, only looked at the auditor's reports. Now, if the auditor's

29432 reports are competent in this case, and if they are admissible on this point, why possibly that paper is. The testimony is that that corresponds with the auditor's reports. I do not know—

Trial Examiner Norwood: It seems a little bit incongruous for this witness to read from this paper a string of eight or ten figures and a couple of decimals here on the idea that it is refreshing his memory. Now, I think if those figures are relevant and material, they appear to be so here on the point that I have referred to, I think that you would have to bring the books and let the man who kept the books refresh his recollection from that. But the witness may tell what reports came to his attention about these losses. He may tell what he acted on, what he did in the matter of discharging Mr. Cree, and why, but I am not

just satisfied with this process of his reading those figures in here on the idea of refreshing his memory.

Mr. MacIntyre: It is a matter of getting in a—

Trial Examiner Norwood: Did you ever have a distinct present recollection of those figures?

The Witness: The detail?

Trial Examiner Norwood: In their entirety there.

The Witness: No, Your Honor, certainly not, not at the present time.

Mr. MacIntyre: Your Honor please, we object to
29433 going into this matter because it is getting in incompetent material which is by word of mouth now just what you ruled out in the documentary evidence a few moments ago. It is a matter of again coming in through the basement or back door with it, when the front door is shut.

Trial Examiner Norwood: Well, this is a collateral issue, and he may give us his reasons for that; that is, he may give us the information on which he acted.

Mr. Paulson: No foundation has been laid.

Trial Examiner Norwood: Not for the truth of those statements.

Mr. Paulson: This witness has not said—and no foundation has been laid—this witness didn't have anything to do with the dismissal of Cree, as far as the record shows.

Trial Examiner Norwood: I think that you will have to lay the grounds for that before you make any of this competent.

Mr. MacIntyre: In fact, Mr. Johnson, the president of the company, has testified he handled that matter.

Trial Examiner Norwood: Yes.

29434 Mr. MacIntyre: He saw to it, what was done, and he has decided the reasons therefor.

Mr. Withrow: Of course, the record is not complete in this case yet, Your Honor; I think that a few new facts will come out.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: Well, is this for the purpose of impeaching Mr. Johnson now?

Trial Examiner Norwood: Go ahead.

I do not think that he should use that paper.

Mr. Withrow: In view of Your Honor's rulings, we won't proceed with that line of questions.

Trial Examiner Norwood: Yes.

By Mr. Withrow:

Q. Mr. Bolster, did you have any occasion to go to the Aetna Company's office in Michigan after becoming secretary and treasurer?

A. Yes, I went out there in the fall of 1935.

Q. Would you tell us whether or not this was the first time you met Mr. Cree?

A. I think that was the first and only time that I ever saw Mr. Cree.

Q. Was it the first time that you met Mr. O'Neil?

A. That is correct.

Q. What was the purpose of your visit to Michi-
29435 gan?

A. Largely to look the plant over; I had never seen it.

Q. What conclusions did you reach as the result of your trip to Michigan?

Mr. Paulson: I object. It is calling for conclusions, for one reason, and, secondly, I don't know that the question is definite enough, even. It is a broad general question that opposing counsel cannot understand. It don't seem to be even properly in the case. We ought to have the right to know what they are asking.

Mr. Withrow: If Counsel would prefer it, I will ask this question—

Trial Examiner Norwood: Yes.

By Mr. Withgow:

Q. What did you observe on your trip to Michigan?

Mr. Paulson: What do you mean? On the train looking out of the windows?

Trial Examiner Norwood: I think that it will presently appear.

Mr. Paulson: It is not a proper question; I object.

Trial Examiner Norwood: The objection is overruled.

Read the question.

(Last question read.)

A. I saw the plant; I saw the salesmen, Mr. Cree, two others, Mr. Lingeman, the then general manager; talked
29436 with them an hour or two. I looked over the books of the company that were kept in the then Detroit office; I formed certain impressions as to the—as to Mr. Cree and the other two salesmen. Mr. Lingeman I had met several times before.

Mr. Paulson: I object to the witness continuing, Your Honor. We are just getting a narrative, as I expected that we would.

Trial Examiner Norwood: The objection is overruled. Let him finish his answer, and then you can move to strike it, if you want to.

By Mr. Withrow:

Q. Did you complete your answer?

Trial Examiner Norwood: Complete your answer.

The Witness: I think that completes the answer as to what I saw.

By Mr. Withrow:

Q. Would you tell us what, if any, action you took as the result of the trip,—as the result of your investigation at Michigan?

A. No action at that time. The matter continued to be discussed by Mr. Johnson and myself, as to the condition of the plant, the condition of the books, the desirability of continuing the then management, and whether the changes should be made. That discussion lasted through 1935 and well into the spring of 1936.

Q. Well, after this investigation, what were your recommendations?

29437 A. My recommendations were that Mr. Lingeman be dismissed. He was then, in my opinion, a sick man; he died shortly afterwards. I did not think from my impression that I got when I was in Detroit, and what I had seen of the records of the company, that it was being aggressively managed. I recommended a complete overhauling of the books, and the employment of a new manager.

Finally, in the spring of 1936, Mr. Calvin, who Mr. Johnson knew, and whom I had not met up to that time, came on to Boston.

Mr. Paulson: I submit that the witness has answered the previous question. Let us have another question.

Trial Examiner Norwood: I understand.

Mr. Paulson: He said what did he recommend and he has ended his discussion of that. We must proceed with question and answer, I submit.

Trial Examiner Norwood: The objection is overruled. I think he may tell us these circumstances here.

Go ahead.

A. Mr. Johnson recommended Mr. Calvin as the general manager. I met him. I was bound to rely very largely upon Mr. Johnson, because he knew the cement trade, and I did not, and finally we hired Mr. Calvin in July of 1936.

I was not impressed with Mr. Cree, referring to his dismissal, although I had not known him long enough
29438 of my own knowledge, to fairly judge him; but I certainly was not impressed with my first hour's talk with him,—the reason, and main reason, why I joined in the directors' action of dismissing Mr. Lingeman and Mr. Cree.

Mr. Paulson: All of this, from this last question, I object to. Really, we should proceed with question and answer.

Trial Examiner Norwood: The objection is overruled. Go ahead.

A. (Resumed) The main reason was the fact that we were hiring a new manager who insisted, under his employment, upon full control of the personnel at Bay City, as well as Detroit, where the offices were.

I was unwilling to encumber a new manager with any of the personnel that he did not want, and he distinctly said that he wanted to be the general sales manager himself; he did not consider Mr. Cree a good manager or salesman, and did not want him in the organization.

By Mr. Withrow:

Q. And whose position did Mr. Calvin—

Mr. Paulson (Interposing): Just a moment.

Before any question is asked, I want to move to strike that answer as being not responsive.

Trial Examiner Norwood: The motion is denied.

By Mr. Withrow:

29439 Q. Whose position did Mr. Calvin take,—Mr. Lingeman's or Mr. Cree's?

A. Mr. Lingeman's.

The witness identified Resp. Ex. 1832-A and B
29440 as a letter signed by Oscar J. Lingeman, former manager of Aetna, dated July 14, 1936. He recognized Mr. Lingeman's handwriting. He identified Resp. Ex. 1833-A and B as an inter-office communication from Mr. Calvin, the present manager, to the witness concerning the audit. The auditor was Arthur Andersen & Company employed in 1936. The handwriting on Resp. Ex.

proper voir dire examination. I have no objection if Counsel wishes to waste the time.

Mr. MacIntyre: I do not see that it is necessary for the man to read all the papers. It is a matter of his acquaintanceship with them; if he is able to identify them he ought to be able to tell us what they relate to.

Trial Examiner Norwood: I do not think you need go into that except in a very general way to tell us what the subject matter is.

The Witness: Of course, I cannot answer your question categorically without reading these letters. I have not seen them for, I don't know how long. I can see certain clauses, figures, that immediately refresh my mem-
29446 ory that those things were in discussion at the time.

You ask me to state that nothing is in there about the policy. I am guessing. I do not think there is.

By Mr. MacIntyre:

Q. Sales policy. But they do relate to the conditions of the books and the method of bookkeeping?

A. In a very large part, yes.

Mr. MacIntyre: If Your Honor please, I believe that voir dire has been pursued sufficiently at this time.

Trial Examiner Norwood: We will have a five minutes' recess. Counsel will have a chance to look over those documents.

(There was a short recess taken.)

Trial Examiner Norwood: Come to order, please, gentlemen.

Proceed.

Mr. Withrow: There are some offers pending, Your Honor.

Trial Examiner Norwood: Yes. Are there any objections to those proffers?

Mr. MacIntyre: Yes, we have some objections. I would like to ask one or two further questions on voir dire as to one or two of them.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

29447 Q. As to this Respondents' Exhibit, for identification, 1844-A, B, and C, can you tell us particularly with respect to C, what that is?

A. All I know about it is what the letter purports to be

Q. You do not know of your own knowledge from whom and by whom it was written?

A. No, except what the letter shows.

Q. What about 1844-A and B?

A. Well, that I know to be a letter from Mr. Calvin, because I recognize his signature.

Q. To Mr. Johnson?

A. And that letter, I presume, refers to this 1844-C, which is a copy of a letter of which I know nothing.

Mr. MacIntyre: It is going to be necessary to state objections to these papers—that is, to some of them differently from the objections to the others, if Your Honor please, but it will take a very short time.

With respect to Respondents' Exhibits, for identification, 1835, 1836, 1837, 1832, 1834, 1833, 1838, 1839, 1841, 1845, and 1846, we object, first because they are irrelevant and immaterial, they have no bearing on any of the issues or any of the evidence that has been introduced here by the Commission. They, for the most part—I call your attention to 1845-A, B, C, happens to be dated January 20, 1937, talking about, or it goes on to state con-
29448 ditions under which the carrying on of the books of account was being made under an auditor or bookkeeper that had been hired, by the name of Mr. Tripp. The others in the group that I have just mentioned relate for the most part, as the witness has stated, to the method and conditions of bookkeeping under a predecessor of Mr. Tripp, a Mr. O'Neil, indicating that some one in this company, possibly the new general manager, Mr. Ben W. Calvin, was not satisfied with the bookkeeping methods of Mr. O'Neil. Nothing could be further from the issues or the evidence in this case as introduced by the Commission. They do not even mention Mr. Cree, about whom some evidence has been introduced by the Commission. They do not touch upon or relate to the sales policies or the pricing methods used by the company which, of course, were brought into issue through the introduction of some evidence by the Commission at the time Mr. Cree was on the stand.

Trial Examiner Norwood: Do you indicate that the business had theretofore been carried on inefficiently?

Mr. MacIntyre: The bookkeeping had been carried on inefficiently, but I want to call your attention to the fact that Mr. Cree was not the bookkeeper. He was not the general manager; he was the sales manager of the com-

pany. And now to come in with a bale full of papers and attempt to put them in the record here on the show-
29449 ing that some stenographer, or some office boy in the company probably was not doing his duties just right, it seems to me far beside the point in this case.

I also want to call your attention to the fact that Respondents' Exhibit, for identification, 1835 carries what purports to be factual statements concerning—it is dated also January 11, 1937—concerning payment?

Trial Examiner Norwood: Is that prior to or after Cree's discharge?

Mr. MacIntyre: Some eight or ten months afterwards. As we understand the record, the notice of discharge was during July, 1936.

Mr. Withrow: Lacking about six months.

Trial Examiner Norwood: All right.

Mr. MacIntyre: Well, it was approximately six, then.

We do find one document that mentions Mr. Cree; that is Respondents' Exhibit, for identification, 1844-A and B.

Mr. MacIntyre: It, however, is dated August 17, 1936, more than a month after Mr. Cree had left the company.

29450 Mr. MacIntyre: It, as I have stated, is dated more than a month after Mr. Cree's separation from the company and relates to some deduction that is made by a customer of the Aetna Company from one of his bills; this deduction having been made, and apparently the entire transaction having been carried on after Mr. Cree's separation from the company.

I believe that Respondents' Exhibit, for identification, 1846—well, I have already covered in the first group that I mentioned.

Now, Respondents' Exhibits 1843, 1842, and 1840 do relate to the dismissal of Mr. Cree. They show the dates on which he is supposed to have become separated from the company. I would say that if we do not already have in the record originals of which these are carbon copies, or appear to be carbon copies, that we could not say that they should be objected to.

29451 Mr. Withrow: Well, you don't have the originals yet, Mr. MacIntyre.

Trial Examiner Norwood: Go ahead.

(Mr. MacIntyre hands to the Trial Examiner Respondents' Exhibits, for identification, 1842, 1840, and 1843.)

Mr. MacIntyre: All the others, however, we have ob-

jected to on the grounds that we have already stated, and on the further grounds that they contain what purport to be factual statements by people who have not been called or presented as witnesses, and subjected to cross-examination.

We have no means of determining, under the circumstances here today, the truth or the accuracy of such statements, and we feel, for that reason, that such statements are going into the record in this manner improperly; they are incompetent, and for the reasons I have already stated, they are irrelevant and immaterial.

Mr. Withrow: Could I have the documents, Mr. MacIntyre, that you object to?

Mr. MacIntyre: Yes (handing documents to Mr. Withrow).

Mr. Withrow: I assume that there are no objections to the ones that the Judge has.

Trial Examiner Norwood: Yes, 1840, 1842, and 1843.

Mr. Withrow: Your Honor, it is the Respond-
20432 ents' contention that these documents should be received in evidence. They are part of the circumstances surrounding an overhauling of the local Michigan administration of the Aetna Company, and they all have a bearing on that problem.

A portion of the picture was put in by the Commission as being relevant and material to the issues. At the time that question was presented it was our contention that they had no place in this case, and we so objected. Now, we are merely filling out that picture, and I believe that they should be admitted.

I think that if you examine these documents you will see that they have a bearing on that picture. You do not change a company over night, and these reflect the changes which took place during that period when the company that was in Michigan was being changed and overhauled.

Trial Examiner Norwood: Well, now, the Commission put this picture in by direct evidence through Mr. Cree, and he was cross-examined, and through Mr. Johnson, and he was examined by both sides.

Mr. Withrow: Well, Your Honor, they put in their part of this case by all the papers that Mr. Cree could find.

Trial Examiner Norwood: Yes.

Mr. Withrow: And, as I recall his testimony, he
29453 dug into his cellar on three separate occasions and found additional papers.

Trial Examiner Norwood: He had a letter from Mr. Johnson, and some others.

Mr. MacIntyre: And, if Your Honor please, we are not objecting to these three papers to which Mr. Cree was a party, and which come from the company's files.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: What we are objecting to now, however, are papers to which this witness is not a party. Let us see—the ones that we are not objecting to, are Respondents' Exhibits 1843, 1840, and 1842.

Trial Examiner Norwood: That is right.

Mr. MacIntyre: We are objecting to all of the others in the offer.

Trial Examiner Norwood: These other letters,—some of them that you describe there, they do not seem to be parts of transactions at all, but reports and things that should be gone into here by witnesses and subject to cross-examination, I think.

29454 Trial Examiner Norwood: Now, you introduce these to show what?

Mr. Withrow: I introduce these to show a part of the picture to complete the picture of the overhauling of the Michigan branch of the Aetna Company, a part of which picture was put in when Mr. Cree was on the witness stand.

Trial Examiner Norwood: That is, to indicate—

Mr. Withrow: To show the manner in which the company was—

Trial Examiner Norwood: To show that Mr. Cree was discharged for inefficiency? Is that the idea?

Mr. Withrow: Your Honor, I only want to show what the facts were in the Michigan office of the Aetna Company for what inferences can be drawn from those facts.

Trial Examiner Norwood: Well, is there anything in there that this witness cannot tell us about?

Are you putting these up to corroborate something that he has not yet testified to?

Mr. Withrow: This witness has testified he was a practicing attorney in Boston, he was not on the site,
29455 these are reports made to him, or to Mr. Johnson, copy of which he received from the local management in Michigan during the course of this overhauling.

Trial Examiner Norwood: Yes.

Mr. Withrow: Now, he is a responsible executive of the company.

Trial Examiner Norwood: Well, do you want to establish the facts—the truth of the factual statements in those letters by them?

Mr. Withrow: I want him to show what they purport to show, Your Honor; that is all.

Mr. MacIntyre: If Your Honor please, there is one thing that we should not overlook in this discussion, and that is that they deal with what is described in the letters as a "sloppy" method of bookkeeping in the company, and the consequent discharge of the bookkeeper because of that alleged condition.

Now, what in the world does that have to do with the issues in this case?

Trial Examiner Norwood: Well, you have shown that the bookkeeper was discharged.

Mr. MacIntyre: Yes, but we have not gone into the bookkeeping part of this company.

Trial Examiner Norwood: But you—

Mr. MacIntyre: He is not engaged in the selling 29456 policies of the company, and never was. He was engaged in bookkeeping. He went into the practices,—the sales practices of the company.

Trial Examiner Norwood: The Counsel has told me that already.

Now, do you contend that there could be no inference drawn against these Respondents for discharging the bookkeeper?

Mr. MacIntyre: No, the Commission will not, on its record, attempt to draw any inference that this company, and the industry, were in collusion with a view of eliminating price competition in its taking the action of discharging its bookkeeper.

Trial Examiner Norwood: Well, does that statement—

Mr. MacIntyre: —Mr. Albert O'Neil.

Trial Examiner Norwood: Does that apply to Mr. Lingeman, too?

Mr. MacIntyre: We have not as yet put into issue the matter of Lingeman's discharge. We have put into issue the matter of Cree's discharge.

Now, when we do—if we do—put into issue the matter of Lingeman's discharge, I cannot say just what inference,

if any, might be drawn from that; but, until we so—it is not put in by the pleadings—until we do, and it is attempted to do so, and we have been allowed to put in the issue through evidence, the circumstances underlying
29457 Lingeman's discharge, it seems to me that we are fighting straw men by the Respondents' Counsel being allowed to put in such available papers as relate to it.

Trial Examiner Norwood: Was it shown that Cree was charged with any responsibility with respect to the bookkeeping?

Mr. MacIntyre: There has been no such showing here.

Mr. Withrow: Your Honor, Mr. Cree attributed to himself the running of the entire company by his own testimony.

Trial Examiner Norwood: Well, the evidence is that Mr. Lingeman was general manager and Mr. Cree was sales manager and responsible for the sales policy. Is there any evidence to the contrary?

Mr. Withrow: I think I have said all I can say here. I think it is relevant and material, Your Honor.

Mr. MacIntyre: This, Your Honor please, is no more relevant than bringing in the fireman who fired the boiler in the plant and saying now, "Did you do a good job or didn't you, and we had you fired because you did not."

Trial Examiner Norwood: Well, it is not so far removed from that.

Mr. MacIntyre: Well, it is very closely approaching it, as we said:

Trial Examiner Norwood: I think you might go
29458 ahead with this witness and bring out everything he knows about this, and I shall, if you wish me to, retain those papers until I can give them some study and reserve my decision on them, if that is satisfactory to you. I cannot see now that any of them are competent except these three here that may come in my agreement.

Mr. MacIntyre: We have no objection as to those three providing they are not duplicated in the record, and if they are I think we can work out with Respondents' Counsel the matter of arranging which ones shall stay in.

Trial Examiner Norwood: Yes. Can you go on with this witness and permit me to reserve the ruling on the remainder of those exhibits?

Mr. Leisure: The trouble with that is this witness will

be going within a few minutes, and we do not know whether he is going to examine from the exhibits.

Trial Examiner Norwood: Let me see them.

(Mr. Withrow hands the exhibits to the Examiner.)

Trial Examiner Norwood: Now, this 1832-A, B, C, is all in regard to Mr. Lingeman's health. Is it denied that he was discharged because he was in bad health?

Mr. Leisure: Well, because that affected his work, I suppose that was the reason.

Trial Examiner Norwood: Well, it was abundantly in evidence that he was in bad health, and I think Mr.
29459 Johnson testified directly that he was discharged on account of that, and I do not think there is any testimony to the contrary.

Now, here is a statement by Mr. Calvin to Mr. Bolster attributing dishonesty to some of the predecessors, and all that. Do you think that that should go in here by letter, even if it were relevant?

Mr. Withrow: It is an inter-office communication of this company, Your Honor.

Trial Examiner Norwood: I say, do you think that that should be admitted in evidence here?

Mr. Withrow: I would not have offered it if I had not thought so.

Trial Examiner Norwood: Without Mr. Calvin being on the stand, and in the absence of any relevancy appearing.

Mr. Withrow: Well, I think all those papers are relevant and material.

Trial Examiner Norwood: Well, that does not look like it would be fair to anybody to receive that in here.

(There was a short pause in the proceedings.)

Trial Examiner Norwood: Now, this auditor's report here, the letter containing the auditor's report cannot be admitted unless the auditor is here and swears to it and can be cross-examined on it.

The papers proffered as Respondents' Exhibits
29460 1840, 1842, and 1843, for identification, are received in evidence in the absence of objection; and the objection is sustained as to the remainder of those between 1832 and 1847, inclusive.

Respondents have their exception.

(RESP. EXS. 1840, 1842, and 1843, were offered and received in evidence.)

Mr. Withrow: In view of Your Honor's ruling, I have no further questions.

I tender the witness for cross-examination.

Trial Examiner Norwood: Examine him.

Mr. MacIntyre: May we have a moment or two, if Your Honor please,

Trial Examiner Norwood: Yes.

(There was a short pause in the proceedings.)

Mr. MacIntyre: May we proceed, Your Honor please.

Trial Examiner Norwood: Certainly, cross-examine.

Cross-Examination by Mr. MacIntyre.

Q. Mr. Bolster, I believe you said that you had served as secretary and treasurer of the Aetna Company since April, 1935?

A. Correct.

Q. And that you have served as a director of the
29461 Aetna Company since what date?

A. I cannot fix the exact date. It must have been ten or twelve years prior to that, I think it was in either 1917 or 1924.

Q. Since 1924 have you taken occasion since you have taken the office of secretary and treasurer to examine the books of the Aetna Company, particularly the earnings' reports over a period of years?

A. Yes.

Q. Did you do so while you were director and before you became treasurer and secretary?

A. I saw the reports but not in the detail I have since seen them, of course.

Q. Haven't you noted during or for a number of these years during which you have been director and secretary-treasurer that the earnings of the Aetna Company were very satisfactory to Mr. Payne?

Mr. Withrow: Your Honor, I object to that question. The question should be more specific as to what years; and, furthermore, we are going into matters which were not covered on direct examination.

Trial Examiner Norwood: The objection is overruled.

The Witness: Let me have the question, please.

(Question read.)

A. Mr. Payne was not alive at any time while I
29462 was treasurer. I succeeded him.

By Mr. MacIntyre:

Q. Well, during the time you were director.

A. There were years undoubtedly when Aetna Company were doing well.

Q. And those were years in which Mr. Harold S. Cree was sales manager, weren't they?

A. I think that is correct.

Q. The earnings were satisfactory to all in the Aetna Company so far as you were aware, were they not?

A. I do not think I heard anything about it one way or the other.

Q. Well, apparently satisfactory so far as you were concerned?

A. I had no thought of them one way or the other.

Q. Isn't it a fact that you know that the earnings exceeded 10 percent for a number of those years?

Mr. Withrow: Your Honor, I object to that question. We offered to show certain specific earnings, specific figures. We were foreclosed. I think Counsel and the Commission should not go into this matter, and furthermore this all antedates the period concerning which this witness testified. I do not think we should go into it, and furthermore the books and records of the company are the best evidence.

Trial Examiner Norwood: This witness made 29463 some general statements there about the company losing money, didn't he?

Mr. Withrow: The question limited it to certain definite years. Now, we are talking about a period away antedating that and having to do with the hiring or firing of Mr. Cree, and as I recall that is what the examination was about.

Trial Examiner Norwood: Well, let's see. I do not know that it has anything to do with it.

Mr. Withrow: Well, Your Honor, if this company earned 10 percent in 1920, what bearing has that why Mr. Cree was fired in 1936? Obviously none. We are wasting time.

Trial Examiner Norwood: It might have some. A little bit.

The objection is overruled.

Mr. MacIntyre: Will you read the question to the witness?

Trial Examiner Norwood: Read it.
(Question read.)
A. I do not know.

By Mr. MacIntyre:

Q. You have no recollection at this time as to the amount of their earnings?

A. I have not. You are referring to prior to my
29464 becoming treasurer.

Q. During the period that you were a director of the company.

A. I have no memory about it; that is, in detail; I mean, as to percentage.

Q. You just do know—

A. I do know that many years we made money.

Q. Did you ever hear Mr. Payne express any dissatisfaction as to those earnings during those years; that is, previous to the depression years?

A. I can recall none now.

Q. These losses that you did refer to on your direct examination occurred during the so-called depression years since 1930, 1929, or 1930, did they not?

A. That is right.

Q. I believe you stated you had had only about one hour's conversation with Mr. Cree, that was the only time that you saw him.

A. That is right.

Q. And that was during 1935.

A. In the fall of 1935.

Q. Now, subsequent to that and shortly after the time that Mr. Ben W. Calvin became general manager of the company, I believe you said that he then suggested that he did not like Mr. Cree and did not want him in the organization; is that your testimony?

29465 A. Who, Mr. Calvin?

Q. Yes.

A. I did not see Mr. Calvin until July of 1936. During that time Mr. Johnson and I had discussed the condition of Mr.—the desirability, as I say, of cleaning house, Mr. Cree, Mr. O'Neil and Mr. Lingeman. That discussion, as I testified, I think went on from my trip, the time of my trip in the fall of 1935 until July of 1936.

Q. Well, do you recall a statement you made on direct examination when I asked you if you were then—asked

you off the record—if you were referring to Mr. Calvin when you said he did not like Mr. Cree, and did not want him in the organization—you said you were referring to Mr. Calvin.

Do you remember that statement?

A. That is correct, when I met Mr. Calvin.

Q. Yes.

A. But that was—

Q. Just what date?

A. But that was some time in July of 1936.

Q. That was before the discharge of Mr. Cree?

A. That's right.

Q. Mr. Calvin told you that he did not like him and did not want him in the organization?

A. I don't know that he said he didn't like him.

Q. I understand—

29466 A. He said he didn't want him in the organization.

Q. I understood you to say that he did not like him and did not want him in the organization.

A. I think I probably said that Mr. Calvin didn't have a good opinion of Mr. Cree's abilities as a general sales manager, and that Mr. Calvin wanted to be the sales manager himself; he did not want a sales manager in the first instance when he came in.

Q. Mr. Calvin had not, previously, been connected with your company, had he—up until that time?

A. No.

Q. Did he tell you what basis that he was using to form his opinion as to the reason why he would not care to have Mr. Cree in the organization?

A. The only one that I remember is that he said he did not consider him a good sales manager, whether he used the word "salesman" at the same time, I don't know. I don't recall.

Q. Did he inform you, at that time, that he had formed that opinion of Mr. Cree's abilities as a sales manager,—during a time that he was attempting to compete with Mr. Cree?

A. Well, I don't know, except that I do remember Mr. Calvin saying that he had known Mr. Cree for some time—how long I don't know.

Q. And Mr. Calvin was an official of the Consolidated

Cement Corporation during that period of time
29467 that he had known him, was he not?

A. He was working for some cement company before he came to us.

Q. In a sales office, a sales capacity?

A. That, I don't know.

Q. You didn't know anything about Mr. Calvin's background when you hired him?

A. Personally, I did not.

Q. Mr. Johnson told you that he had been in a sales office, or sales department, of a cement company, though, did he not?

A. Well, frankly, I can't recall just what Mr. Johnson said about it. The only impression I gained was that Mr. Johnson was very favorably impressed with Mr. Calvin, and Mr. Johnson was then president of the company, I was content to leave it to his judgment.

Q. Who actually handled the transaction that resulted in the dismissal of Mr. Cree from the Aetna Company?

A. It was discussed between Mr. Johnson and myself, and I think in the board of directors; Mr. Johnson had what I may call the contact, he did the dismissing, as president of the company.

Q. He actually did the act, itself?

A. He did, yes.

Q. Did you make any trips with Mr. Johnson to New York, before that act?

29468 A. New York?

Q. Yes.

A. What do you mean, in connection with the cement company?

Q. Yes, in connection with the—

A. No, I did not.

Q. —discussion revolving around Mr. Cree.

A. No.

Q. Did you sit in on any discussions in Boston between Mr. Johnston and representatives of other cement manufacturers, at which time—

A. No, sir.

Q. —Mr. Cree was discussed?

A. No.

Q. Do you know of the discussions that Mr. Johnson did have with the representatives of the other companies

at which time the questions concerning Mr. Cree were discussed?

A. I know nothing about it, if they existed.

Q. Mr. Johnson did not tell you about them?

A. No.

Q. Never mentioned them to you?

A. Never as to any discussions. I think he did say—but I can't recall the names—that someone had recommended Mr. Calvin, but I presume it was somebody connected with his former employer. I have no memory about it at all.

Q. He did not tell you about discussions with
29469 Mr. Charles Hogan of the Lone Star Cement Corporation in New York?

A. If he did, I have forgotten.

Q. He didn't write you concerning those discussions?

A. I don't think so.

Q. As you can recall now?

A. Not that I can recall.

Q. Do you recall him having written you or talked to you about discussions that he had with Mr. Pierson of the Lone Star Cement Corporation, in Indiana—

A. No, sir.

Q. —concerning Mr. Cree?

A. No, sir.

Q. You have no recollection on that at this time?

A. (Witness makes no audible response.)

Q. Would any documents that he had written you concerning that refresh your memory on that, do you think?

A. If I saw the document, it might; but I don't think so.

Q. Such documents as he would have written you concerning that would not have been written to you as an attorney, but as the treasurer and secretary of the company, wouldn't they?

Mr. Withrow: Your Honor, I object to that question. It is hypothetical.

If Mr. MacIntyre has any document, I think he might ask him in what capacity, but if there is such a letter, in what capacity was it written.

29470. I mean, after all, I think we ought to stick to the facts.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Mr. MacIntyre: Now, we are attempting—

Mr. Withrow: He said there were no suggestions.

Trial Examiner Norwood: Well, he said he had no documents whatsoever, didn't he?

Mr. MacIntyre: That is, as to his recollection. We are probing the witness' memory now.

Trial Examiner Norwood: He asked him if such documents had been written whether he would have a recollection of having received them.

Mr. MacIntyre: Well, in what capacity, though? He is an attorney and we want to know—

Trial Examiner Norwood: Ask him that first and then you can ask him the capacity.

As to the question involved, I will sustain the objection to that one question.

By Mr. MacIntyre:

Q. Well, in what capacity did you receive documents from Mr. Johnson, and from others in the Aetna Company, and the cement industry, concerning Mr. Cree?

Mr. Withrow: Your Honor, we object to that question. He hasn't testified he received any letters from
29471 members of the cement industry or from Mr. Johnson.

Trial Examiner Norwood: Well, you can answer that.

Mr. Withrow: And we should have the specific documents to which he is referring.

Trial Examiner Norwood: You can answer that, if you received any.

A. I have no recollection of receiving any, in any capacity.

Mr. MacIntyre: In direct examination, Your Honor please, the witness has testified that certain documents were sent him, some were in copy form, and he had received them from Mr. Johnson. Now, I am attempting to determine in what capacity he received those.

Trial Examiner Norwood: Well, he said now he received none. You may ask him if he wants to change his testimony.

Mr. MacIntyre: Yes.

Trial Examiner Norwood: Or ask him if that is his testimony.

Mr. Withrow: Your Honor, if Mr. MacIntyre is now going into these letters that you excluded, I am going to

object on the added grounds that I do not think he should examine the witness about these, havin objected to their receipt in evidence.

Trial Examiner Norwood: Well, if he goes a little too far your papers will be in. maybe, if you will be quiet.

29472 Mr. MacIntyre: Well, I am not referring to those particular papers. This witness has been in the service of the company for some 12 or 16 years, according to his testimony. I am attempting now to determine in what capacity he served that company.

Trial Examiner Norwood: Go ahead.

Read the question.

(Last question read.)

Trial Examiner Norwood: Well, now, he stated he did not receive any.

Mr. MacIntyre: All right, if that is his answer.

The Witness: May I correct that, Your Honor?

Trial Examiner Norwood: Yes.

The Witness: I am not certain that I did not receive any document,—any letters,—from Mr. Johnson, concerning Mr. Cree.

Trial Examiner Norwood: Yes.

The Witness: I thought the Examiner was asking me as to whether I had received anything with reference to certain conferences.

Trial Examiner Norwood: Yes.

The Witness: That Mr. Johnson had had with other officials.

Now—

By Mr. MacIntyre:

29473 Q. That is, concerning Mr. Cree.

A. Yes, concerning Mr. Cree. I cannot recall that I ever did. Of course, I have received communications from Mr. Johnson as secretary-treasurer, and as a friend.

Q. On direct examination you spoke of Mr. Renee Payne.

A. Yes.

Q. And that you have since April, 1935, or some time since April, 1935, become a trustee, holding the stock of Mr. Payne in the company.

A. I am trustee of two different estates where I hold stock.

Q. In the company?

A. In the company, yes.

Q. What are the total holdings of Mr. Payne as of the time of his death?

A. Oh, roughly—

Q. Or, what were the total holdings as of the time of his death?

Mr. Withrow: Your Honor, I think that we are just wasting time. I have no other objection. I do not see how this is material or relevant to any of the issues. It was not gone into on direct examination at all.

Mr. MacIntyre: Well, after the witness answers, if I cannot show that it is relevant to a question asked by Mr. Withrow on direct, I will ask you, myself, to strike it.

29474 Trial Examiner Norwood: I have the impression that you went into that feature of it.

The objection is overruled.

A. Twelve or thirteen hundred shares.

By Mr. MacIntyre:

Q. What percentage of the total voting stock of the Aetna Company did that amount to?

A. A little over 10 percent—11 or 12 percent.

Q. Is there any other single holder holding that large a percentage of the Aetna voting stock as of the time of Mr. Payne's death?

Mr. Withrow: Your Honor, I am going to object to that question, and I am also going to move to strike the question—and the answer to the preceding question. I do not think that it has any bearing at all upon the issues in the case.

Trial Examiner Norwood: The objection is overruled.

A. May I answer generally? That Mr. Payne held, as I say, twelve or thirteen hundred shares, which I now hold as trustee under his will.

Another decedent client of mine held six hundred and some odd shares, which I now hold as trustee, other than Mr. Johnson's block, or something like 500 shares, possibly a little short of 500. Those are the large blocks of stock in the company.

29475 By Mr. MacIntyre:

Q. Is your answer, then, that Mr. Payne's was the largest block—

A. That is correct.

Q. —held in the company?

A. That is correct, at the time he died.

Mr. MacIntyre: Well, if Your Honor please, I would like to point out the reasons for asking those questions, so that the relevancy may appear.

Mr. Withrow: Your Honor, there is no motion. I do not see any excuse for taking up time.

Mr. MacIntyre: Oh, there is. There is objection. It was let in with the understanding that we would attempt to show the connection with the direct examination, and I will do it.

Trial Examiner Norwood: I should like to know.

Mr. MacIntyre: There was an attempt on the direct examination to show that it was a dissatisfaction on the part of the stockholders with the then present plan in the management of the Aetna Company by Mr. Cree.

Now, the witness has testified that Mr. Payne was satisfied with the earnings during Mr. Cree's—or at least did not express any dissatisfaction during Mr. Cree's sales management, and this shows that he was the largest of the stockholders.

20476 That is the relevancy.

That is all, Mr. Bolster.

Trial Examiner Norwood: Did you make a thorough investigation of Mr. Cree's ability as a sales manager—what he had done for the company—.

The Witness: No, I did not.

Trial Examiner Norwood: —and when he went into it, and all about it?

The Witness: I did not.

I formed, in that visit to the plant in the fall of 1935, as the first and only time I ever saw Mr. Cree, whether rightly or wrongly, a very decided opinion that he was not the man that I should want in the company for me.

Trial Examiner Norwood: That was the opinion that you—the opinion as an official at the time you made this investigation?

The Witness: That was the opinion of the board of directors when we got through investigating.

Trial Examiner Norwood: Was that prior to Mr. Cree's discharge?

The Witness: Oh, yes.

Trial Examiner Norwood: Go ahead.

Redirect Examination by Mr. Withrow.

29477 Q. Mr. Bolster, when you were being examined by Mr. MacIntyre about satisfaction and dissatisfaction of Mr. Payne, were you expressing an opinion about the period prior to 1932, or subsequent to 1932?

A. Oh, I understood that he was referring to the time of Mr. Payne's lifetime, and prior to 1932, when the company began to slide as to its profits.

Mr. Withrow: That is all, Your Honor.

29480 A. T. WOOD thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Leisure.

Since Green Bag of W. Va. started producing cement, it has not increased the capacity of its mill of 600,000 barrels. The mill operates four kilns on cement and the maximum amount of cement shipped, I believe, was a little over 400,000 barrels in one year. The reason for building a capacity in excess of 400,000 barrels was that when we transferred from the refractory business to the cement business, it was only necessary to add grinding equipment. We figured that 600,000 barrels would be reached some day

29481 provided business got better. However, we have not reached it yet. We have not operated at full capacity during any three months' period.

Q. Are you familiar with any so-called historical clinker production?

A. Any what?

Q. Are you familiar with any so-called historical clinker production?

A. No.

Q. Do you in the conduct of your particular plant find any large construction programs which cause or tend to cause any fluctuation in your shipments?

A. No, we do not cater to the large contracts. We try to handle the dealer situation entirely. Large contracts would, of course, certain seasons bring us pretty well up to the limit on capacity, might interfere with our regular dealers' business which we are always looking out for. It might at times interfere in that they would not receive

the service that we like to give; therefore, we are not interested in any large contracts which would fluctuate capacities.

Q. Well, then, other than the seasonal factor and general market conditions, do you have any fluctuation?

A. Well, of course, in the season it is pretty well up—

29482 Q. I said other than that.

Q. Yes, other than that.

Q. That is, from year to year?

A. Year to year.

Q. Mr. Wood, do you make any schedule of operations for the coming year?

A. We try to calculate what is coming out.

Q. Do you receive the statistics of The Cement Institute?

A. Yes.

Q. What use, if any, do you make of them?

A. We glance them over, and that is about all.

Q. What is your combined capacity for finished cement and clinker, Mr. Wood, if you know?

A. Storage capacity, the finished is around 20,000 barrels; the clinker capacity about 80,000 barrels.

Q. Do you make any use of clinker statistics—

A. No.

Q. From what you have told us I take it you do not—Suppose you tell us whether or not you do solicit large contracts?

A. No, we do not.

Q. Well, now, in making these estimates of future business, do you depend upon the information you have as to local conditions in your territory?

A. Yes, through our salesmen, who are traveling around noting conditions, we form our own opinion.

29483 Now, you have indicated previously that you are not interested in these large contracts, but, rather, in the dealer business. What has been your experience with that?

A. It has been very successful. We have been able to operate the plant practically the entire year, barring floods and strikes and conditions beyond our control.

Q. Do you store your clinker in the open or in closed storage space?

A. Open.

Q. Does your company subscribe to such reports as have been mentioned here,—I think Dodge and Dun's?

A. No, no.

Q. As to the Mallory service, did Mr. Mallory ever consult you about the rated capacity of your plant, or any other plant?

A. No.

Q. Are you familiar with any so-called three-largest-months-of-production formula capacity?

A. No.

Q. You told us yesterday you joined the Institute, and you have told us today that you received statistics from the Institute since the Code; did you receive any statistical service prior to that time?

A. No.

29484 Mr. Wood, do you recall any industry meeting which you attended at which any so-called plan for sharing available business was discussed?

A. Yes.

Q. Is Commission's Exhibit 597-A to D the minutes of the meeting that you just mentioned (handing said exhibit to the witness)?

A. I believe this was the meeting that I was at, yes.

Q. And is this the so-called plan, Commission's Exhibit 2917 (handing document to witness)?

A. Yes.

Q. What was your attitude toward that plan, Mr. Wood?

A. Very much against it.

Q. Why?

A. I think our allotment, according to the allocation, was a yearly tonnage which you couldn't live under. I
29485 think it was around, as I recall the figure 120,000 barrels,—or 119,000.

Q. Did you find that there was any kind of alignment of big companies against small companies over what was a fair plan?

A. Well, I couldn't answer that; I don't know; I didn't notice any.

Q. So far as your knowledge goes, did any plan for sharing the business ever become operative at all?

A. No, absolutely not.

Q. Has there ever been any arrangement, to your knowledge, in district 3, or in any of the districts in which you do business, for the allocation of business?

A. No.

Q. As the result of the negotiations for that plan, proposed plan, did you ever refuse any business?

A. No.

29497 Trial Examiner Norwood: Back to the record.

It appears that all of these data may be checked from the records of the Bureau of Mines.

Now, with respect to this exhibit, Respondents' Exhibit 1848, and similar exhibits received for Respondent, or which may hereafter be received, they are received subject to the permission of the Respondents being given to the Commission's Counsel to have access to the data in the Bureau of Mines' records.

Mr. Leisure: Well, I don't know anything about the—I have no control over the Bureau of Mines—and I am not going into that; but I only point out to the Examiner that we have a stipulation on the record with regard to just such data as this.

At the time that the Commission was putting in its case Mr. Wooden had in mind that there were certain things that he wanted to get in evidence, and he came to me and asked me whether or not I would enter into the stipulation. The stipulation was not proposed by me; it was proposed by Mr. Wooden.

He said he thought we could both save time; that
29498 there would be certain figures that we would both want to put in, and if the other side would agree to make the supporting data available, that he thought we could save time, and I said, "That sounds reasonable to me," and we entered into that stipulation.

Now, we have been receiving a number of exhibits just like this, and I assumed that it was under the stipulation, and I do not see how this goes outside of it.

Trial Examiner Norwood: Now, I want to reverse my ruling with regard to the ones heretofore, and make their final consideration in evidence conditioned on the supporting data in the Bureau of Mines becoming available to the Commission.

Mr. Leisure: Why does Your Honor limit it to the Bureau of Mines? Why aren't the original reports better than the Bureau of Mines'?

Trial Examiner Norwood: Yes, that is true, where they are available in the offices of the Respondents, that would suffice.

Mr. Leisure: Yes.

Trial Examiner Norwood: But it appears here that the original data is destroyed.

Mr. Leisure: No, the reports which he has—everything which these papers—which these figures come from are in existence,—they are from his reports.

29499 Trial Examiner Norwood: But does it have the full data as to all months here?

The Witness: Yes.

Trial Examiner Norwood: For the few years?

The Witness: Yes.

Trial Examiner Norwood: The only thing is it is unfair to let a portion of this data come in here when the balance which might give grounds for opposite inference is located in the—

Mr. Leisure (Interposing): That is not the situation. Every one of these figures,—the reports from which they are taken,—are in existence.

Mr. MacIntyre: Yes, but, Your Honor please, let us not forget this fact, we are talking about records on file.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: They are on file, as I have outlined, with the Bureau of Mines; but they are not available. And why? Not because the Bureau of Mines does not care to make them available to us, or to the public; but they are not available because this Respondent, and the other Respondents, have caused the Bureau of Mines to tacitly pledge themselves to these Respondents not to make them public.

Trial Examiner Norwood: Yes, I understand that.

29500 Mr. MacIntyre: And we feel without the Respondents submitting to us here the basic data from which such tabulations are made, or, at least releasing from that understanding of confidence the Bureau of Mines so that we can check these particular figures there—

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —that they should not be received in evidence here against us.

Trial Examiner Norwood: Well, I will receive these—

Mr. Seeley: Your Honor, we don't—

Trial Examiner Norwood: —subject to this complete data being made available to the other side.

Mr. Leisure: Your Honor—

Mr. Seeley: We object very strenuously to Your Honor's ruling, and we want to point out that it is inconsistent

with the practice we have observed and followed with Your Honor's approval so far, and I want to point out specifically that the statement just made by Counsel for the Commission is not the fact; it is incorrect.

We are not talking about records on file over there at the Bureau of Mines. We are talking about the records in this Cement case. We are meeting the evidence. He hasn't put in any figures from the Bureau of Mines, and we do not care what the figures over there are, we are meeting the evidence here; we are completing the picture.

29501 Trial Examiner Norwood: Yes.

Mr. Seeley: Here are these records. Is Counsel for the Commission prepared to withdraw these exhibits as to this particular Respondent, and as to other Respondents on whose behalf we have offered the true and correct and complete figures? That is the question.

Trial Examiner Norwood: Well, are those exhibits containing part of the data?

Mr. MacIntyre: They contain the data that The Cement Institute published.

Now, Mr. Leisure, through this witness, is attempting to attack The Cement Institute figures, claiming that they are not correct. We contend that they are correct, unless and until we have proved, or that they have proved through the basic data from which they were taken, that they are incorrect.

Mr. Seeley: That is what we are doing, and the witness is subject to cross-examination.

Mr. MacIntyre: Yes, but how can you cross-examine a man who has no independent recollection as to the cumulative total of all of these thousands of transactions?

Trial Examiner Norwood: Well, now—

Mr. MacIntyre: You know good and well that this man's memory does not carry all of that data.

29502 Trial Examiner Norwood: It is very clear now. That is the reason that we had this rather thorough discussion of the case. It is very clear to me that none of these should be considered, not this one or those that we have received heretofore, unless and until the supporting data, and the figures to complete the story, are made available to the Commission's Counsel, either in the offices of the Respondents or on their order to the Bureau of Mines, or anywhere else that the figures may be.

I think that that is the fair thing, and I do not think that we should do anything else than that.

Mr. MacIntyre: I would suggest—

Trial Examiner Norwood: I won't make it anything less than that.

Mr. MacIntyre: I would suggest that a statement from the Respondents to the Bureau of Mines that the Bureau of Mines can certify what the figures are to us, and we would accept that as a check—we want to put them to just as little trouble as we possibly can in order to ascertain what the facts are.

Trial Examiner Norwood: I shall overrule the objection and receive Respondents' Exhibit 1848 subject to the conditions I have named.

(RESP. EX. 1848 was offered and received in evidence.)

29503 Mr. Leisure: Now, does Your Honor vary the terms of the stipulation? Do you intend your ruling to do that, because the stipulation is very plain as to that.

Trial Examiner Norwood: What stipulation is that?

Mr. Leisure: The stipulation that Mr. Wooden and I entered into at the beginning of the case when he wanted to get in material just like this.

Trial Examiner Norwood: Yes?

Mr. Leisure: And the stipulation was that if we would make available,—if the other side would make available supporting data; and we did not specify in the stipulation that it had to be some secondhand report to a Bureau of Mines. All that was said was that the supporting data was to be made available. Now, I would expect—

Trial Examiner Norwood: I think the condition I am placing here is in accordance with that stipulation. I do not think it changes it in the slightest.

Mr. Paulson: I think it does not protect us because we cannot go to 77 companies and look at those. That is obviously and very patently impossible. We have not the time nor the money, the Government would not pay, we could not ask to go to 77 companies and check these statistics. They have them in their possession; when they dig them out let them bring the data with them, when they
29504 want to offer it that way. We have offered a shorter way. We can't go to their office and get those papers. It is impossible.

Trial Examiner Norwood: The stipulation as we have discussed it here, it seems to me that it involved either the

bringing to the hearing of the supporting data, such as bids and so forth, or the reference to it in some public office here in Washington, where these documents were available to the other side.

Mr. Leisure: We would not need a stipulation if that were it. Then the law would undertake to cover it. I do not know what Mr. Wooden had in mind, but I do know how I interpreted what he said. My understanding was that where he had some Government official who could vouch for the exhibits, who could say he had taken them from certain records, or where we had some company official who could take the stand and vouch for the records as being correct, that unless there was some question about the figures, the exhibit could go in. If there was any question about the figures we could send an accountant out to check them to see whether or not they were correct. But by and large the stipulation would cover the situation. Now, that was my understanding of it.

Trial Examiner Norwood: Now, I am going to receive this as I have made it and let the stipulation take care of it itself, that is between you and Mr. Wooden.

Mr. Paulson: I do not know that Your Honor un-
29505 derstands our objection still stands. We want an exception to it. We cannot go out to 77 companies and check the records, and Your Honor consistently refused to receive tabulations from us unless we brought the data here, or the only instance in which there was an exception, we could not get it, it was available in the Government office, and we named the place and did the best we could, otherwise nothing was received here that they could not check. We did not make the supporting data. It is a new rule. I protest.

29508 By Mr. Leisure:

Q. Mr. Wood, do you make any use of the Mallory figures, and, if so, what use do you make of them? I am now referring to such figures as are represented by Commission's Exhibit 3205 (handing said exhibit to the witness).

A. We do not use them at all for any purpose.

Q. Do you adjust your rate of operation to any
29509 set percentage of your capacity?

A. No, we set our rate of production with sales.

Q. As to those estimates that you told us about this

morning, what has been your experience since you have been operating,—ho close have you been able to estimate the demand?

A. In the period of covering a year, I would say within one or two percent.

Q. Do you furnish the Institute with any figures on capacity?

A. No, no.

Q. Did you during the Code?

A. No.

29510 Q. Will you tell us, Mr. Wood, whether or not your company has any agreement with your competitor based on the statistics furnished by The Cement Institute in any wise?

A. Nothing whatever.

Q. Do you concern yourself with statistics from other districts than district 3?

A. No.

Q. Have you been able to increase your percentage of the total sales in your district since the company began?

A. Why, I would say yes.

Q. You have told us what you estimated was the capacity of your plant, Mr. Wood. How do you base that, please?

A. You mean the 600,000?

Q. Yes.

29511 A. According to the capacity of the kilns and the grinding units.

Q. Well—

A. Their capacities, plus the number of days in the year.

Q. Does that mean that you have actually operated at that capacity?

A. I believe one month we were up to the capacity of 50,000 barrels,—that would be the six hundred a year.

Q. Does that include your capacity for clinker grinding?

A. Yes, yes.

Q. Do you use your own capacity figures in planning your operating schedule?

A. Yes.

Q. Since you began to operate, has there been any change in the form you use in reporting to The Cement Institute?

A. None whatever.

Q. You have told us that you did not receive any reports from The Cement Institute before you joined; did you make any reports to The Cement Institute before you became a member?

A. No.

Q. I asked you some general question about the Mallory reports. I do not remember what it was; but, specifically, I would like to ask you whether or not you use them in any way as a guide to a check on your shipments—

A. No.

29512 Q. —or your sales force?

A. No.

Q. Well, Mr. Wood, do you compare your shipments for the year with the previous year?

A. Yes, sir.

Q. How often do you get reports from the Bureau of Mines?

A. Oh, I would say once a year in book form, usually about a year old.

Q. Do you make any use of that year book?

A. No.

Q. Well, now, as to the reports and statistics that you receive from the Institute,—will you tell us how you regard the reports on progressive business and building reports?

A. We don't think that they amount to very much for our use; don't use them, as a matter of fact.

Q. Do they give you any different information from the other service, such as the Dodge reports?

A. We don't get the Dodge reports.

Q. Now, other than the period that you told us about, I think the flood, I think you said in 1937,—have you shut your plant down?

A. Once during the strike. The strike, I believe, was 1937, and ran over to 1938.

Q. And you operate how many days a week there?

A. Seven days a week.

29513 Q. Do you accept any lower mill net in the winter time?

A. No, sir.

Q. Now, with regard to this so-called Ironton base, do you, Mr. Wood, have any foreknowledge of what the base is going to be at any particular time?

A. No, sir.

Q. Do you know in advance what particular mills are base mills?

A. No.

Q. Are any given territories governed by the same base mill, in your experience?

A. Well, they may vary a little on out-bordering lines.

Q. Well, as far as your company is concerned, have you ever agreed to recognize any particular base or to refrain from recognizing one, or acting as a base mill or not to act as a base mill, as far as your plant is concerned?

A. Absolutely no.

Q. When you started to operate your plant, Mr. Wood, what did you find as to methods of marketing—I mean, were your competitors at that time selling at destination prices, or in some other manner?

29514 A. Destination prices is what we found.

By Mr. Leisure:

Q. Can you tell us whether or not you at that time attempted to figure prices back, and, if so, what you found? I mean, tell us whether or not they figured back at any constant point in certain places?

A. When we started in we had one awful job finding out prices, and the only way we could get them was through our salesmen, and then checking back with official railroad rates, and by that method we could get some comparison of what the prices at the various mills were.

Q. I neglected to ask you yesterday, Mr. Wood, what the shipping point is for your mill.

A. Kenova, W. Va.

Q. That is Kenova.

29515 Now, after going through this experience that you have just mentioned with regard to prices, what is your practice now,—does your sales department calculate what base prices are being used as figuring points?

A. No, we just meet competition wherever we find it.

Q. Do you furnish your salesmen with any so-called list of basing points?

A. No.

Q. Now, without spending time on it in a series of several questions as to the practice that your follow, can

you tell us whether or not you follow the practice you have already described in the case of price changes?

A. In price changes, why, it is just a matter of a few hours and our salesmen find them out, and we investigate and correct the prices, meet competition.

Q. Have you at any time marketed your product in any so-called zones of uniform prices?

A. No, sir.

Q. Have you at any time, to your knowledge, found any so-called duplicate basing points?

A. Not that I recall.

Q. Or have you established, or attempted to establish, a so-called basing point at a competitor's mill?

A. No.

Q. Has The Cement Institute ever had anything
29516 to do with how you determine your prices?

A. Absolutely not.

Q. In your sales of cement at Kenova, is there any transportation charge involved?

A. In Kenova?

Q. Yes.

A. You mean from the plant in Kenova?

Q. Yes.

A. To dealers in Kenova?

Q. Yes, sir.

A. Switching charge.

Q. In your experience, do you or have you ever at any time employed any basing points at which no cement was manufactured?

A. No.

Q. Have you ever received any list of basing points from The Cement Institute, Mr. Wood?

A. No, sir.

Q. Have you ever given any such list to any of your competitors?

A. No, sir; not having them, never did.

Q. Since the Green Bag Company has been in business, Mr. Wood, has the Federal Government ever purchased any of its cement?

A. Oh, I think we have sold a little; not much. Small repair jobs, something like that.

29517 Q. As to the Federal Government, and State, and municipal, and all Government bodies, have you

ever quoted on any different basis than you quote your commercial business?

A. No, sir.

Q. When you have so quoted have you ever had any assurances from any of your competitors as to what their bid prices would be, or that they would be any different than the going commercial prices at the place to be quoted?

A. Nothing.

Q. Have you ever requested permission to withdraw any bids that you made?

29518 A. Never.

Q. Have you ever submitted any bids to the State Highway Commission of Oklahoma?

A. No, sir.

Q. Or Mississippi?

A. No, sir.

Q. Indiana?

A. No, sir.

Q. Or Iowa?

A. No, sir.

Q. Or South Dakota?

A. No, sir.

Q. Have you ever made sales in any of those territories?

A. No, sir.

Q. Now, you told us yesterday you received the freight rate book.

A. Yes, sir.

Q. Why do you use those books, Mr. Wood?

A. We do not use them very much.

Q. When you do use them, what is the purpose of using them?

A. It is a matter of information; possibly some fellow in a border district, out of our shipping territory, might be a contractor who is kind of estimating on what the job is going to cost him, and he will say "What is the price of

29519 cement at such and such a place?" being out of our territory, regular shipment, of course, it is necessary, then, to have the rates in order to give him some idea what it is going to cost.

Trial Examiner Norwood: You do not use it in making prices in your regular territory?

The Witness: No, out of our—in our regular, we do not use the books, outside only,—just a matter of good

will to the prospective contractor; maybe on some future time of wanting to get closer by good will.

By Mr. Leisure:

Q. In the event of a change in freight rate, Mr. Wood, do you employ the new official tariff or the old rate?

A. The new official tariff.

Q. And with respect to that and other shipments, do you or do you not find that the railroad agent checks them in any way?

A. On our bills-of-lading going out we insert the rate as we figure it is at that time with the instructions that if there is any change which we have not heard of, the car—the rate has to be re-checked before the car goes, so that when the car leaves it is being billed on the accurate rate, and the accurate rate is inserted on the bill-of-lading.

Q. Have any of your customers, to your knowledge, Mr. Wood, ever demanded the privilege of buying at your mill and delivering to destination by truck?

A. No.

29520 Q. Have you ever attempted to forbid the loading of cement on trucks furnished by customers?

A. For a while truck deliveries were made, but we were always against it; that was only a short period of time in which the dealers, themselves, were against it.

Q. I say, have you ever attempted to forbid the loading of cement—

A. No.

Q. —on trucks—

A. No.

Q. —furnished by customers?

A. No.

29522 Q. Mr. Wood, Mr. W. W. Campbell, on January 22, 1931—I am referring to 1043-A, Mr. MacIntyre—

29523 said one trucking concern or a combination of trucking concerns, forming a national set-up, went to almost all, if not all, manufacturers of cement offering to truck any and all cement from their plants to dealers' warehouses or to jobs for the price of the railroad freight to that point.

Did any such—was there ay such application made at your plant?

A. No, sir.

Q. Mr. Wood, in Commission's Exhibit 1043-S, a move-

ment is mentioned which was instituted by manufacturers and dealers to establish trucking from manufacturers.

Did you have anything to do with any such movement?

A. No.

Q. Or know anything about such movement?

A. No. We were opposed to trucking, and always have been.

29524 Q. Have you ever had, Mr. Wood, anything to do with any coordination between the railroads and dealers with respect to trucking?

A. None at all.

Q. Have you ever shipped any of your product into a so-called e.f.a. territory?

Mr. Leisure: I am now referring, Mr. MacIntyre, to Commission's Exhibit 1043-B, if you are interested.

A. Is that the central freight association territory?

By Mr. Leisure:

Q. Yes, sir.

A. Only I would have to have the boundary lines to tell you that.

Q. Have you ever had any conferences with anyone, or did you take any activity, with railroads, or others, with respect to short-haul rates, in such territory?

A. No.

Q. Did you take any part in any hearings, with regard to that matter, on April 8, 1938, or November 5, 1937?

A. No, sir.

Q. Did you ever take part in any conferences with the Universal Company, looking forward to closing your plant to trucks, around December 4, 1931?

A. No, sir.

Mr. Leisure: That is Exhibit 1348-A, Mr. MacIntyre.

Trial Examiner Norwood: Are you speaking for

29525 your entire company and for all its officials?—

The Witness: Yes, sir.

Trial Examiner Norwood: —in these matters?

The Witness: Green Bag Cement Company of West Virginia, Kenova; yes, sir.

By Mr. Leisure:

Q. Have you ever kept any file on land-grant rates, Mr. Wood?

A. No. Land-grant rates are not in our shipping ter-

ritory, so we don't have anything—don't know anything about them, hardly.

Q. Have you ever used the so-called control clause?

A. No.

Q. To your knowledge, are there any special freight rates to which the Government is entitled in any of the territory in which you do business?

A. Not to my knowledge.

Q. Have you ever done anything, Mr. Wood, to thwart the efforts of the Government officials to secure f.o.b. prices on cement?

A. Not a thing.

Trial Examiner Norwood: Do you ever sell f.o.b. mill?

The Witness: No, sir.

By Mr. Leisure:

29526 Q. Have you at any time, or do you now, employ barges for the purpose of delivering your cement to the buyer?

A. We have shipped in barges, yes.

Q. To what points have you used water transportation in your shipment of cement?

A. We haven't any regular points right at the present time. We used to ship to Cincinnati; we used to ship to Charleston, W. Va. That's about the only two points.

Q. What about Pittsburgh?

A. Never—well, shipments to Pittsburgh were during the construction of the Green Bag Pennsylvania plant.

Q. Was that wholly by water or part way?

A. That was all the way by water.

Q. Does that apply to Cincinnati and Charleston?

A. Yes, all-water route.

Q. What means of transportation did you use as to these water shipments?

A. You mean the power end of it, the tow-boat end of it, you mean, or—

Q. Well, what I really had in mind was how it was carried.

A. In barges.

Q. What part of your total shipments move by water?

A. Oh, very, very, very small; it would run into fractions.

Q. What determines whether you will ship by water or not, Mr. Wood?

29527 A. Usually the receiver, he is possibly able to handle it as easy as by car, or possibly easier than car rail shipments.

Q. Well, what is the size of a minimum barge load?

A. Barge—minimum barge will run about 15 carloads.

Q. Did you own your own barges?

A. Yes, sir.

Q. How many did you operate?

A. At one time we had nine, and we sold five, lost one by sinking, and we have three left, which we would be very glad to sell.

Q. What did you find your comparative costs of transportation to be by barge and rail?

A. Very little—

Q. What?

A. Very little difference.

Q. Well, these barges, were they all along the Ohio River from Pittsburgh to Cincinnati, or were they just on the shipments to Cincinnati?

A. Cincinnati.

29528 Q. Just to Cincinnati?

A. Just to Cincinnati.

Q. Why don't you ship less than a barge load by water?

A. Well, usually, the transportation people that have the boats to push the barges charge you just as much for a half a barge as a full barge, and, therefore, your prices are out of line.

Q. Is there any public barge service of any kind?

A. Oh, yes, yes. The Union Barge Line makes a specialty.

Q. And do they, to your knowledge, publish cement rates?

A. They publish cement rates for river transportation.

Q. Are there any others publishing it?

A. Well, that is the only one I know of.

Q. And how do their rates, if you know, compare generally with rail rates?

A. Charleston, W. Va., their rates are higher than rail.

Q. You mentioned your desire to do business with the dealers. Do you limit your sales to the middle men who fall within the so-called definition of cement dealers?

29529 A. Well, a dealer, as we look at a dealer, and we recognize a dealer in cement, handles building materials such as lumber, tile, brick, lime, cement; has trucks

to make deliveries, and is able to perform services and, of course, his finances are satisfactory to us. He is a dealer. Now, there are lots of various sized dealers, some are smaller. We treat them all exactly alike.

Q. Do you have any set policy as to who you would recognize as a dealer? I have in mind some of your small towns that you probably sell to. Do they all have the facilities which you just described?

A. If we happen to open up a new town, we think there is any sales, previously the man that is more or less in that kind of line, he is a dealer, has handled cement before, or any other building materials, we recognize him as a dealer.

Q. Suppose there is a general store in the town and nothing else except an undertaker, and the general store does not sell cement, do you sell to the undertaker?

A. We just question him as being a dealer.

Q. Do you give the Federal Government any special preferences as purchaser?

A. No, sir.

29530 Q. Do you have any understanding with any of your competitors that you will or will not recognize certain specified qualifications as a dealer?

A. Absolutely not.

Q. Or do you have any such understanding with any dealer organization?

A. No, sir.

Q. What was your reason for adopting this policy of selling through dealers, Mr. Wood?

A. We thought it was the best policy. It would be better to have a lot of dealers and business coming in all the time than to cater to large contracts coming in on us fast, and then when we were through we were down. We have found that it has proved out very satisfactory.

Q. Have you followed that policy consistently or not?

A. Yes, sir; yes, sir.

Q. What part of your sales is made through dealers, if you know?

A. Practically 100 percent.

Q. You said you sold some small jobs in the State of West Virigina; that is the State of West Virginia Road Commission, I believe. Did you quote them direct?

A. Yes.

Q. When was that?

A. Oh, we quote them direct every now and then.

29531 Q. Have you always quoted direct?

A. Always quoted them direct.

Q. Did you ever issue any printed announcement of your concept of your—any so-called definition of a dealer?

A. No, sir.

Q. Do you sell to contractors?

A. Small contractors.

Q. And did you sell them direct?

A. Well, it depends on whether it is for a state job, or something of that kind. If it is for State work, we sell them direct, but mostly, I believe—that is, it is practically direct, yes.

Q. Was your experience satisfactory or unsatisfactory with them?

A. Well, it did not prove very satisfactory.

The Witness: Oh, I would say we have some 350 dealers.

Trial Examiner Norwood: Do you issue printed quotations in case of change of prices?

The Witness: No. Our salesmen usually go around and notify them the prices; once in a while we will send
29532 out notices of price increase or price decrease.

By Mr. Leisure:

Q. Did anyone ever attempt to influence you, or did you have anything to do with a so-called Lehigh selling plan?

Mr. Leisure: I am referring now, Mr. MacIntyre, to Commission's Exhibit 1131-J to—

A. No, sir.

Q. Did you ever adopt any such selling plan?

A. No.

29533 Q. What has been the sales policy of your company?

A. To make a satisfied customer through a dealer; that's our only policy.

Q. Have you ever changed it?

A. Never have changed it.

Q. Do you distinguish in any way between any so-called recognized or unrecognized dealers?

A. No.

Q. Did you have anything to do with, or do you know anything about any committee of manufacturers negotiating with dealers for discontinuance of the so-called Lehigh plan?

A. Didn't have anything to do with it, and don't know anything about it.

Q. Have you ever attended any meeting where any discussion of so-called bag allowances was discussed?

A. No, sir.

Q. In deciding whether you will sell to a customer as a dealer, do you give any consideration to the fact as to whether or not he is or is not a member of any dealer organization?

A. We don't.

29534 Q. Do you specify whether or not your dealers must handle only your brand of cement?

A. No, sir.

Q. As a matter of fact, do they handle more than one?

A. They handle several grades.

Q. Do you give any of your dealers a so-called exclusive agency for your product in their territory?

A. No, sir.

Q. Did you have any different policy before the Code than the one that you followed after?

A. No, sir.

Q. Are you familiar with Article XI?—

A. I have heard of it.

Q. —So-called?

A. I have heard of it.

Q. It did not affect your policy in any way?

A. No, it didn't affect us at all.

Q. Well, now, did you, before or during the Code, attempt to obtain approval of a provision which would require a division of customers into classes whom you might sell direct, or those whom you would be prohibited from selling direct?

A. No.

29535 Did you enter into any sort of understanding with your competitors, or know anything about so-called classification or division of customers?

A. No, sir.

Q. What are your terms of sale and discount, Mr. Wood?

A. Ten cents fifteen days discount.

Q. Have you changed your policy as to terms of sale and discounts since 1927, when you first began?

A. Never have changed.

Q. Do you make any exceptions to your usual terms?

A No exceptions.

Q Have you had any conferences or understandings

with your competitors as to what your terms of discount will be?

A. No, sir.

29536 The witness identified Resp. Ex. 1849-A and B as a sales contract form which the company used along in 1928 or 1929. Since the Code the company does not take care of any contracts in signed form.

29537 By Mr. Leisure:

Q. You said you used to use it. Have you ever used it since the Code?

A. No.

Q. Have you sold any of your product on future job contracts since the Code, Mr. Wood?

A. No, sir.

Q. And did you ever report specific job contracts to The Cement Institute?

A. No, sir.

Q. Do you compete with any foreign cement importers?

A. No, sir.

Q. Have you at any time threatened or boycotted any dealer customers who traded in imported cement?

A. No, sir.

Q. Have you ever checked on any of your dealers to see whether they sell imported cement?

A. No, sir.

Q. Have you ever at any time agreed with your competitors or conferred with them in any way as to establishing and maintaining uniform deviations from cement prices?

A. No, sir.

Q. Have you ever come into competition with foreign cement?

A. I believe at one time there was some foreign

29538 cement at Charleston, W. Va.

Q. When was that?

A. Well, only once that I recall, away along in 1928, I believe.

Q. What did you do about it, Mr. Wood?

A. We did not do anything with that. We thought it would run out on account of being so far inland there would be very little of it come in.

Q. Did this—I am not clear from what you said how this affected you, whether it affected your competition.

A. Well, it would a little bit, of course, but the quantity was not sufficient to worry about the thing.

Q. Well, I wonder if we can cover the whole subject with one question: Have you ever taken any measures with respect to foreign cement?

A. No, sir; no.

Q. Have you used or do you use any so-called arbitrary prices?

A. No, sir.

Q. Do you use any method by which you seek to control diversion of shipments, Mr. Wood?

A. We merely stamp the bill-of-lading; the car can't be diverted unless with our consent.

Q. Have you ever engaged in any cooperative measures with respect to diversion with any competitor?

A. No, sir.

29539 Q. Do you have any policy with reference to the diversion of shipments of cement in transit?

A. No, sir.

Q. Do you have any position on it? Are you opposed to it or in favor of it?

A. Well, the position—I think that I made a decision to stamp the bills-of-lading, was to keep one dealer from infringing on another dealer in a little further town, from interfering with one another.

Q. Do you recall, Mr. Wood, receiving any so-called Compendium from The Cement Institute?

A. No, sir.

Q. Has it had any effect of any kind on the marketing practices of your company?

A. Well, I could not say. I never received it. I do not imagine so.

(RESP. EX. 1849-A and 1849-B was offered and received in evidence.)

29540 Q. Have you ever had any conversations, or conferences, or agreements with your competitors concerning cement specifications?

A. No, sir.

Q. Commission's Exhibit 1391, Mr. Wood, indicates that you received invitation 1394; will you tell us whether or not you received it (handing document to the witness)?

A. We did.

Q. Did you bid on that invitation?

A. We did not. That is 1394?

Q. Yes.

Why didn't you bid on that, Mr. Wood?

A. The destination, as I recall, was beyond our shipping district, and the specifications were such that some of the cement we didn't make, and while we could have—and while we can make this special, we don't care about it on account of the plant design, which keeps us away from this special stuff. Being the Government here, I have forgotten the size of the amount here (witness examines 1394)—the quantity was so large that we wasn't able to take care of it.

Q. Have you ever made any cement under the specifications SS-C-201?

A. No, sir.

Q. Or have you ever made any under the specifications SS-C-206?

29541 A. No, sir.

Q. Or SS-C-211?

A. No, sir.

Q. Did you bid on T.V.A.?

A. No, sir.

Q. You are listed as having received the invitation.

A. We received the invitation.

Q. Why didn't you bid, Mr. Wood?

A. Quantities are beyond our means of handling.

Q. Were land-grant rates available to you into that territory?

A. No, not there; I believe they were to our competitors.

Mr. Leisure: Mr. MacIntyre, I am referring to Commission's Exhibits 399-A to 3-Z, and 925-A-6 to B-6.

By Mr. Leisure:

Q. You are listed in another Commission's exhibit as having bid at Fort Meade, Md.,—303-D is the exhibit. Did you bid on that letting (handing document to the witness)? As I say, you are listed as having bid. I want to know whether you did.

A. Well, that is just listed as "Green Bag." It don't mean us. It might mean Green Bag of Pennsylvania. We didn't bid.

Q. You did not bid?

A. We didn't bid.

Q. You are also listed as having bid in Commission's Exhibit 386-G. That is at several points,—Bureau of Sup-

plies and Accounts, 1932 (handing document to witness)?

29542 Did you bid on that letting?

A. (Witness examines paper) No, we did not bid on any one of these.

Trial Examiner Norwood: That just specifies Green Bag, does it, or doesn't it?

Mr. MacIntyre: It shows that a Green Bag Company did bid.

Mr. Leisure: It doesn't say which.

The Witness: We didn't bid.

Mr. Leisure: It should be excluded, unless he specifically includes it.

Trial Examiner Norwood: I think he said he didn't make any bids to the Government, didn't he?

Mr. Seeley: Except the one in Chillicothe.

The Witness: Chillicothe.

Mr. Seeley: Five hundred barrels.

The Witness: Small one.

Trial Examiner Norwood: You made no other bids?

The Witness: No other bids.

29543 By Mr. Leisure:

Q. Mr. Wood, did you file any prices with the Trade Practice Committee after the—or with The Cement Institute—after the Schechter decision?

A. No, sir.

Q. Did you file prices with the Code Authority during the Code?

A. Yes, sir.

Q. Did you file any price you chose, free from any understanding or agreements with anyone?

A. We filed our regular prices without agreements to anybody.

Q. When you observed that a price was filed by another manufacturer, did you feel that you had to file the same price?

A. No, sir.

29544 Q. I think you told us, Mr. Wood, you attended two meetings of the Institute. Were there any discussions of price or marketing policies at either of those meetings that you attended?

A. No, sir.

Q. You said you did not file any prices after the

Schechter decision. Did you receive any notice of price filings after the Schechter decision?

A. No, sir.

Q. (By Trial Examiner Norwood) Does that include this Trade Practice Committee?

A. Yes, sir.

Mr. Leisure: I think there may be confusion between the witness and the Examiner on that answer "Yes, sir." Without reference to any Trade Practice Committee or anything else after the Code period, did you file prices?

The Witness: No, no.

Trial Examiner Norwood: Nor received any?

The Witness: Nor received.

By Mr. Leisure:

Q. Commission's Exhibit 14-A and B has you down as having bid the Commonwealth of Pennsylvania on May 26, 1937. Did you bid on that letting, Mr. Wood (handing document to the witness)?

A. No, sir.

29545 Trial Examiner Norwood: Do you mean the exhibit has a Green Bag Company as having bid; is that right?

Mr. Leisure: Yes, the Green Bag Company.

The Witness: Green Bag Company.

By Mr. Leisure:

Q. That is correct.

A. We did not bid.

Q. Is New Richmond, Ky., in your marketing territory?

A. I do not believe it is.

Q. Normally?

A. I do not believe it is.

Q. Did you bid on any lettings there to the U. S. Engineers in August, 1935?

A. I do not recall bidding.

Q. I am referring, Mr. MacIntyre, to Exhibit 277-FF and HH, and 989-A to C, which indicates Green Bag.

29546 Q. Do you recall—or, let me put it this way: Did you file prices through the Code for Covington, Va., Christianburg, Va., and Taswell, Va., Mr. Wood?

A. Well, I can't recall right now. We may have filed prices.

Q. Well, Green Bag is listed as having filed in Exhibits 410-A and B. Can you look at those and refresh your recollection and tell us whether or not you filed for those des-

tinations? Here is where Green Bag appears on "B" (handing exhibit to the witness).

A. I just question whether we filed prices at these points. It is in Virginia, and it is out of our shipping district.

Q. You think that Green Bag does not apply to your company?

A. It may and it may not. It says Green Bag, W. Va.,—I don't know.

29547 Q. What is your best recollection?

Trial Examiner Norwood: Was that during the Code?

Mr. Leisure: Sir?

Trial Examiner Norwood: During the Code?

Mr. Seeley: During the Code period, yes.

The Witness: Yes. Well, I just can't tell you offhand whether we filed prices at those. It is questionable, being in Virginia, out of our regular shipping territory.

29548

Washington, D. C.,
December 20, 1939.

29549 E. H. DAVIS, being called as a witness for Petitioners and being first duly sworn, testified as follows:

Direct Examination by Mr. Withrow.

I am associated with the Superior Cement Corporation as president. I have been president of the Superior Cement Corporation since the reorganization was com-
29550 pleted in September, 1939. From May 1931 up until the filing of the petition for reorganization, I was secretary of the company. My other business interests including the mining and distribution of coal; the quarrying and distribution of limestone, sand and gravel; the manufacturing and sales of ceramic products, including brick and tile of all descriptions; the raising of orchards and the farming industry generally; and the generating and distribution of electric energy. I am not an officer or director of any other cement company. The Superior Cement Corporation is not connected or affiliated with the Superior Portland Cement Company, Inc. of Washington

or with any other cement producing company. The
29551 mill is located in Superior, Ohio, about 17 miles out of Ironton, Ohio.

29552-29553 At the time I became originally associated with the company, it was only in a fair condition, but since that time we have spent considerable money in putting it in very excellent condition. Prior to 1931 I had never been engaged in the cement industry or associated with the manufacture of Portland cement. I have never been active in the actual sales end of the Superior Cement Corporation. As secretary of the company I attended the directors' meetings, kept the minutes and kept in very close touch with its financial condition; therefore, in connection with my activities, I was aware of the general financial situation.

29556 As secretary I discussed from time to time matters with F. R. Kanengeiser, president of Superior Cement Corporation. Mr. Kanengeiser was first employed by the Superior Cement Corporation in the latter part of 1931 which was after I became associated with the company. I am not a stockholder in the Superior Cement Corporation in the direct sense. Practically all of the Superior Cement Corporation stock was owned by a corporation whose stock was in trust, of which I was a
29557 trustee. Mr. Kanengeiser resigned from the Superior Cement Corporation as of August 1, 1939 because of ill health. I have taken a very active interest in the company since I became president. I performed the customary duties of a president, including the delegation of powers to different heads of departments and the general supervision of the operations of the company. When I became president I delegated the matter of sales to a sales manager, C. K. Hearn, who has full charge of sales except in the case of a major change in sales policy which is decided by me. When I became president I noticed that
29558 the sales price was running less than it was the year before, and I instructed the sales manager to increase the realization price wherever it was possible. The sales manager has been able to do so to some extent, but not much.

Q. Mr. Davis, are you free to change the marketing policy of the Superior Corporation, if you want to?

A. At any time.

Q. Are you a party to any agreement with any of your competitors to follow this marketing method you use?

A. We are not.

Q. When you say you are free to change your marketing policy, do you mean that you have no sort of arrangement with any company which would keep you from making a change?

A. We have no arrangement with anybody with reference to our sales policy. We can change it in a minute's time if we decide to do so.

Q. When you were secretary did the matter of a price increase in July, 1933, come to your attention?

A. Yes. We were in somewhat of a dilemma in the forepart of 1933—

29559 Q. Well, under what circumstances did this matter come to your attention?

A. We had had considerable losses, this company had, during the years 1930, 1931, and 1932; they had been quite large. Since the stock was controlled by a trust, there was a very difficult situation arose in the minds of the trustees as to just how far they could financially support a business as trustees, without getting into legal difficulties.

I discussed this with Mr. Kanangeiser quite at length. Mr. Kanangeiser also had a difficult situation, if he couldn't secure any additional cash from the trust funds the outlook for the company, as it had been operating the past two or three years, was very bad.

Mr. Paulson: Your Honor, we are getting nothing more nor less than a meeting of the directors as to profits and losses. It is improper.

Trial Examiner Norwood: I think we are getting back to the thing—

Mr. Paulson: I do not see that it is relevant to any of the issues in the case. Just a question of profits and loss. If we are going into them, let us go into

29560 them on an agreed basis, and in an expeditious manner, and not a little here and a little there; but that is what this is, and I object, and move that the answer be stricken, so far as it has gone.

Trial Examiner Norwood: I think that—

Mr. MacIntyre (interposing): This is another one of these basement or back-door situations, not attempting to meet issues fairly and squarely and directly.

Mr. Leisure: Well, Mr. MacIntyre is apparently an artist on this back-door situation, but this situation if is

very clear that unless the Commission is willing to withdraw the charges and the proof under this 1933 price increase, that this witness has the right, and not only the right but the duty to explain the circumstances under which his company took the action which it took. These objections are simply wasting time.

Mr. MacIntyre (interposing): Now, if Your Honor please—

Mr. Leisure: There is no legal objection to such testimony.

Mr. MacIntyre: There is.

Trial Examiner Norwood: I do not see the relevancy of these circumstances that you are bringing out here, unless, as I said a while ago, you want to show that certain practices were adopted because you needed the
29561 money, and because the company was in a bad fix, or something like that,—and the Counsel knows that that would be irrelevant.

Mr. Withrow: Does Your Honor rule that we cannot give these circumstances?

Trial Examiner Norwood: I have not ruled yet.

Mr. Withrow: Well, I—

Trial Examiner Norwood: I will hear from Counsel further.

Mr. MacIntyre: Your Honor please, with respect to the proof that the Commission has put into evidence concerning a price advance, it has put in price a lot, but that was a price advance of July, 1932, at the depth of the depression, and Mr. Wooden asked the people who led that price advance, and others who immediately followed it, what the economic conditions were that prompted them to make that particular price advance. That was in the depth of the depression; but Mr. Leisure misstates the record when he says he is meeting proof now that Mr. Wooden has put in concerning a 1933 price advance.

Let us meet this thing squarely.

(Mr. Withrow rises.)

Trial Examiner Norwood: Now, wait a moment—wait a moment.

If this Respondent wants to show that this is the
29562 mill that initiated that price advance, and show that—

Mr. MacIntyre (interposing): It is so—

Trial Examiner Norwood: —that it had reason for it,

show that it was brought about by the operation of this mill, wouldn't that tend to—

Mr. MacIntyre (interposing): It would—

Trial Examiner Norwood: —to negative the fact that he had followed this competition on it, and that somebody else had led an advance, and that he had agreed with them to do so? Wouldn't it?

Mr. MacIntyre: No, we are talking about an entirely different year, Your Honor please. Mr. Leisure was referring to evidence that Mr. Wooden put in concerning a price advance in the depth of the depression, July, 1932.

Trial Examiner Norwood: Well—

Mr. MacIntyre And Mr. Withrow—

Mr. Leisure: I never said 1932.

Mr. MacIntyre: —is asking about a July, 1933, price advance.

Mr. Leisure: I never said that.

Mr. MacIntyre: We haven't put in any evidence concerning that price advance. We are talking about one, when we talk about the evidence in this case, that occurred in July, 1932. Why don't they meet that?

Trial Examiner Norwood: Isn't there some evi-
29563 dence about a price advance in 1933?

Mr. MacIntyre: Not that we put in. Mr. Withrow last week put in through their witness, Mr. George E. Warren, some evidence, and we objected to it at that time. They are the ones that are putting it in, and meeting it—they are putting in their own evidence and attempting to knock it down as a straw man.

Mr. Withrow: Your Honor, do I understand that Counsel for the Commission is now willing to stipulate that any price advance in July, 1933, is not in issue in this case?

Mr. Leisure: If so, we won't spend any time—

Mr. Withrow: If so, Your Honor, we won't spend any time at all on it.

Trial Examiner Norwood: How about that?

Mr. MacIntyre: It is in issue.

Mr. Leisure: By the complaint.

Mr. MacIntyre: And, incidentally, as all the other price advances and price movements, 10,000 in number, that are in issue in the case; but the specific one that is especially in issue, outside of being incidentally in issue, is the one of July, 1932.

Mr. Withrow: If the Commission is—

Trial Examiner Norwood: Aren't they permitted to go forward and say "Here is one price advance that
29564 this little mill let in?" Is that what you propose to prove here?

Mr. MacIntyre: No.

Mr. Withrow: I think the proof will show that, Your Honor.

Mr. MacIntyre: They are not even offering to prove that this mill led the price advance.

Mr. Leisure: We do not have to.

Mr. Withrow: Your Honor, I specifically offer to show that at this time, I do not think it is necessary, we haven't made that offer.

Trial Examiner Norwood: All right. The motion is denied.

Mr. Paulson: Your Honor hasn't even heard my objection.

I said it was getting costs and profits in, and I think that it is getting those in improperly.

Trial Examiner Norwood: No, no, they are not trying to show what the costs were.

Mr. Paulson: Now, that is—

Mr. Withrow (interposing): We have never mentioned the word "costs."

Mr. Paulson: Your Honor has ruled costs out directly, and I cannot see that you would allow in indirectly what you would not allow directly.

Trial Examiner Norwood: I haven't ruled out all
29565 reference to costs there, because the Commission has brought in the variations of costs.

Mr. Paulson: Are we going to let costs in, or keep them out? And I think we must settle—

Trial Examiner Norwood: Well, costs as bearing on profits I think should not be gone into.

Mr. Paulson: We want to know.

Trial Examiner Norwood: Well, go ahead. I have ruled now.

Mr. Withrow: Was that a motion to—

Trial Examiner Norwood: The motion is denied.

By Mr. Withrow:

Q. Would you tell us, Mr. Davis, whether or not prior to 1933 the stockholders of the Superior Cement Corporation had advanced any money to the Superior Company?

A. Yes, they had—
Q. Would you tell us—
A. —advanced a considerable sum, about $450,000.
29567 Q. Mr. Davis, did you discuss the Superior Company's costs and sales prices with Mr. Kanan-
29568 geiser?
A. Yes, sir.
Q. Do you recall whether or not there was any suggestion that Superior should increase the price?
A. There was. That suggestion came from me.
Q. And as the result of this discussion, was any action taken?
A. Yes, sir.
Q. What?
A. Leading up to the action our—we were, as I said in my former answer, in somewhat of a dilemma as to what to do to keep the cement company on its own feet, and we came to the very definite conclusion there was only one thing to do, and that was to increase the price of cement and do that as quickly as we possibly could. The price was entirely too low at that time, in our opinion, anyway.
Trial Examiner Norwood: Now, did you initiate this price increase, your company?
The Witness: Well, if Your Honor please, it is pretty difficult to say who took the initiative in our company. I represented practically all the stock but the president of the company would send out the notices, of course.
Trial Examiner Norwood: I mean, did your company—did you hear of any others quoting that same price before you did?
The Witness: No, sir. This was entirely our
29569 own individual action.
By Mr. Withrow:
Q. So you broadcasted quotations—I mean the company did—increasing the price?
A. That is right.
Q. And do you recall the amount of this increase?
A. Twenty-five cents a barrel, which we thought would be sufficient at the time.
Q. Well, how was the figure of 25 cents arrived at?
A. We took into consideration the condition of the company by reason of its past operations and what amount would be necessary in order to put that company on the

basis where it could stand on its own feet, having in mind that the N.R.A. had just been enacted, or was enacted in May, as I recall, which we felt pretty positive would also increase cost of production by reason of increased wages and increased cost of raw materials and materials and supplies generally, and we tried to make that increase sufficient to take care of those additional costs.

Trial Examiner Norwood: That was a result of your complete investigation and discussion with all your officers, and your estimate of what it was necessary to do; is that right?

The Witness: That was after quite a long study of this,—of the condition of the cement plant, both on
29570 the part of myself as a trustee and on the part of Mr. Kanangeiser as president of the company.

Trial Examiner Norwood: Was your plant an efficient plant at that time?

The Witness: We felt it was very much up to date at that time.

Trial Examiner Norwood: Modern machinery?

The Witness: There were a few improvements we had to make later, but at that time we felt the plant was about as efficient a plant as there was generally in the industry.

29571 Q. Mr. Davis, would you tell us whether or not prior to announcing this 25-cent increase, you knew that any of your competitors were going to follow this increase?

A. We had absolutely no knowledge of it. In fact, we were very fearful that they would not follow it.

Q. Do you recall approximately when these quotations were sent out?

A. My recollection is it was during the latter part of June, 1933.

29575 Q. I believe you have already stated that you had some rather large losses prior to June, 1933.

Mr. MacIntyre: I object, if Your Honor please.

Mr. Withrow: Could I finish my question, if Your Honor please?

Trial Examiner Norwood: Certainly. Let him finish his question.

By Mr. Withrow:

Q. Could you tell us whether or not you had a loss in 1930?

A. 1930?

Mr. MacIntyre: I object.

Trial Examiner Norwood: The objection is overruled.

A. Yes, sir; about $35,000, as I recall it.

By Mr. Withrow:

Q. Did you have a loss in 1931?

A. We did.

Mr. MacIntyre: We object.

Trial Examiner Norwood: Overruled.

By Mr. Withrow:

Q. About how much?

A. About $160,000.

Q. Did you have a loss in 1932?

29576 A. We did.

Mr. MacIntyre: I object.

Trial Examiner Norwood: Overruled.

By Mr. Withrow:

Q. About how much?

A. About $140,000.

Q. I believe you told His Honor that wages were increased about 20 percent. Now, would you tell us the precise increases in the minimum wage rate?

Mr. MacIntyre: I object, Your Honor please. It is irrelevant and immaterial.

Trial Examiner Norwood: Well, Counsel may have his objection to this entire line if he wants to.

Mr. Paulson: That is to all questions relating to losses and wage increases.

Trial Examiner Norwood: Losses and wage increases.

Mr. Paulson: They seem to like to prove losses and wage increases. It is a very important part of the picture.

Trial Examiner Norwood: And other circumstances surrounding this increase in price.

The objection is overruled.

Mr. MacIntyre: We would like for that objection to cover not only losses, wage increases,—that is, questions and testimony going to those questions, but also

29577 profits and costs as well. We consider that all four of those elements are irrelevant and immaterial to the issues here, and we want the objections to be considered as going to questions and answers touching those four elements.

Trial Examiner Norwood: Well, I think the question of costs is more or less complicated. You had better make

your special objections to each question with regard to costs, but you have your general objection to the rest of this provided that Counsel won't get up and object to each specific question.

Mr. MacIntyre: We feel that they are all intertwined,—the four elements are brothers together.

Trial Examiner Norwood: Yes.

Mr. Withrow: Your Honor, off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Withrow: I believe there is a question pending.

(Question read.)

A. We increased minimum wage rates in June from 27 cents an hour to 33 cents an hour, and in October of the same year from 33 cents an hour to 40 cents an hour.

By Mr. Withrow:

Q. Would you tell us whether or not this increase in wages had a substantial effect on the cost of operating your plant?

29578 A. A very substantial effect. The increases in wages at our plant affected the production of such raw material as we produced at the plant, and wages are a very substantial part of the cost of cement.

Q. Now, did the price of coal that you had to buy increase in 1933?

A. Yes, the price of coal increased. We had definite information that the price of coal was going to increase in June, 1933, when we made this advance.

Mr. MacIntyre: If Your Honor please, we move to strike the witness' answer. We had no opportunity to object there on that cost question.

By Mr. Withrow:

Q. You said you had definite information. What was the source of your information?

Trial Examiner Norwood: The motion is denied, and Counsel may have the benefit of an objection to the question there. I think it is covered by his general objection. Go ahead.

A. I was connected with the coal industry at that time, and at least in the Ohio fields there had been an increase in the wages.

Mr. MacIntyre: Now, we object, if Your Honor please.

We are going into wage increases in the coal indus-
29579 try in 1932.

We object to the question and the answer.

Mr. Withrow: Can't the witness finish his answer?

Trial Examiner Norwood: I think you had better stop there. I think Mr. MacIntyre is right about that.

The objection is sustained.

The Witness: Of course, if Your Honor please, I might explain this—

Trial Examiner Norwood: No. You just stick to the relevant facts surrounding your increase in this price. Let us don't spread it all over the lot.

The Witness: Yes. I wanted to explain, though, Your Honor please, it is pretty difficult to explain why you increase a price unless you give the reason for it, and we had the definite reasons, and that is what—

Trial Examiner Norwood: Well, don't tell the condition in the coal business, to give the reason.

By Mr. Withrow:

Q. Do you know whether or not this price increase in 1933 was sufficient so that you showed a profit in 1933?

A. No, in 1933 we had a very considerable amount of cement orders—

Trial Examiner Norwood: Now, you are going into profits. Now, that is going to be something else.

29580 Mr. Withrow: Your Honor, this company increased the price because it had been losing money, according to the witness' testimony. I want to find out whether the increase was so much that they made a large profit that year.

Trial Examiner Norwood: That would establish a motive for increasing the price, but as to the results of it I do not see that we are interested in the least, and if you are going into profits, that is going to mean something else, unless he is prepared to give us a statement here of all the salaries and all the details to show whether his loss of profit was made because of inefficiency or exorbitant salaries, or exorbitant dividends, or just what.

Mr. MacIntyre: We cannot tell about the losses except for those same elements,—that is, as to whether or not they had watered stock, or paid their officers a hundred thousand dollars a year; of course it would run into losses and they would be in the red if they did that.

Trial Examiner Norwood: I understand, but he can give

the general facts here to explain why he initiated an increase of price here. We do not find many cases of initiating increases in price, and when we do find them they are interesting, and we might as well get the details of them.

29581 Mr. Paulson: I do not think it is proper to get it, though, from the mouth of the witness. Costs are a matter of record, and the records are the best evidence. I do not think you would receive a tabulation of them here, and I do not think you should receive oral testimony of them here. Obviously, he can't remember the figures and facts, and we have no chance to cross-examine him on it.

Trial Examiner Norwood: They are only received to show the state of mind here, and the motives behind the price increase.

Mr. Paulson: Well, they may be just the opposite.

Trial Examiner Norwood: It is perfectly proper for that.

Go ahead.

What is the state of the record?

(Record read.)

Mr. MacIntyre: That is covered by my general objection there; that is my understanding of the matter.

Trial Examiner Norwood: All right.

Ask another question. Go ahead.

By Mr. Withrow:

Q. Now, as to whether this 25 cents increase in July, 1933, was justified, will you tell us whether or not you continued to lose money in 1933?

A. Yes, we lost money, $85,000, as I recall it; $84,000.

29582 Trial Examiner Norwood: That is after you made the increase?

The Witness: After we made the increase.

Trial Examiner Norwood: I think that is objected to, and I think we practically agreed to keep out of that. I shall strike that answer on my own motion.

Q. Since you have been connected with the Superior Company, has it come to your attention, or do you
29583 know whether or not there is any agreement between the Superior Company and any of its competitors to fix or maintain prices?

A. No, sir.

Q. Whether or not there are any agreements to fix or determine sales and marketing policies?

A. No, sir.

29585 Q. What determines the extent of your marketing territory?

A. The mill net that we secure for our product.

Q. Would you describe in a general way the outer
29586 limits in which you market cement?

A. Our market covers the southern part of the State of Ohio, practically all of West Virginia, the western part of Virginia, northwestern part of North Carolina, the eastern part of Kentucky from Louisville east, part of Pennsylvania, and at times a part of Indiana.

Q. Do your salesmen regularly solicit business in this territory?

A. Yes, sir.

Q. How many salesmen do you have?

A. We have eight salesmen, and a sales manager.

Q. Now, would you tell us, if you know, whether there are any territories into which you once shipped cement that have since been abandoned?

A. Yes, we used to have a good market for cement in the northern part of the State of Ohio, but we have lost that market to competitors.

Q. What were the reasons for abandoning that market?

29588 A. The base rate at Cleveland and Toledo were made so low that the mill net—the result was the mill net was lower than we could take business at a profit.

By Mr. Withrow:

Q. Now, is the territory in which the Superior mill is located affected by seasonal variations in demand?

A. Very definitely so.

Q. What regularly affects this demand?

A. Weather conditions.

Q. Would you tell us, if you know, whether or not this variation in demand has any effect on the cost of production?

A. It does.

Q. And would you tell us, briefly, what the source is of the various raw materials that Superior uses?

29589 A. Our limestone is produced right on the property; we also produce some coal on the property; at times quite a bit of coal right on the property; and our silica is produced right on the property. I mean, now, our own property that we own.

By Mr. Withrow:

Q. Mr. Davis, would you tell us whether or not, to your knowledge, there have been any agreements or understandings between your company and other cement companies, relating to a division of marketing territories?

A. No, sir; there is not, and has not been.

Q. Or with reference to an allocation of business?

A. No, sir; there is not.

Q. Now, Commission's Exhibit 1063 shows that you received an invitation to bid to the W.P.A. for the purchase of cement in Mississippi; do you normally sell cement in the State of Mississippi?

29590 A. We do not.

Q. Do you consider your mill a price leader or a price follower?

A. In most cases—in practically all cases—it is a price follower.

Q. Well—

A. Except possibly for the exception of 1933 that I have spoken of prior to this time.

Q. Do you sell at delivered prices?

A. Yes, sir.

Q. How are your delivered prices determined, if you know?

A. They are determined by our best guess based on the information we received from the salesmen in the territory as to what the market will stand.

Trial Examiner Norwood: Will you read the question and answer?

(Last question and answer read by Reporter.)

By Mr. Withrow:

Q. Would you just tell us the form in which the salesmen give you that information?

A. Well, it is given to us in probably several different ways; if it is important information, it is put on the telephone quickly, otherwise, it is included in their reports that they send in, or at times they may telegraph it in.

Q. Do they pick up quotations of competitors and

29591 send them in?

A. Yes, they do.

Trial Examiner Norwood: How many salesmen do you have?

The Witness: Eight salesmen and one sales manager, who cover the territory in which we ship.

By Mr. Withrow:

Q. Do you meet the lowest price that your competitors are quoting at any given destination?

A. We at times have gone a little lower than our competitors at a given destination; but, ordinarily, we attempt to meet that price, the lowest price that we find in the field.

Q. Well, when you went lower, did you quote that price—did you issue quotations at that lower price?

A. No, that price was made verbally.

Q. So that your quoted prices are—

A. Quoted prices are the lowest prices we meet at the market.

Trial Examiner Norwood: Were those confidential prices?

The Witness: Yes, sir;—I imagine you would call them confidential prices,—although they are not confidential very long.

By Mr. Withrow:

29592 Q. Well, when did these—as the Judge calls them —confidential prices commence, then, and how long has your company done that?

A. Well, the company has done that ever since I have been connected with it.

Q. To whom did you make these special price concessions?

29593 A. I think that—I know in most cases they were made to contractors.

Q. Did you make any to dealers?

A. They have made them to dealers, but they have been very few.

Q. Have your salesmen reported that any of your competitors were making such similar price concessions?

A. Yes, they have.

29594 Q. Have you attempted to meet the price concessions of the competitors?

A. We always meet a price concession wherever we find it. We are forced to do it. I mean by being forced to do it, that our dealers tell us about it in a hurry, and we have to meet any price in the field.

Q. Now, during the time, say, from 1931 up to the issuance of the complaint in 1937, would these concessions in price be shown on the invoices of the company?

A. No.

29595 Q. Could you tell us why they were not shown on the invoices?

A. An invoice into any market of a lower price is just the same as broadcasting the price it has been our experience, and we were not making that lower price generally; we were making it just in specific instances.

Q. Would you tell us whether or not it has been your experience that you find your competitors meet lower quoted prices, if they want to stay in the market?

A. Yes, sir; they do.

Q. And do you do that?

A. Yes, sir.

Q. Why do you do it?

A. We have to do it to retain our business.

Q. Have you ever found that your company sold cement for more than your competitors sell it for?

A. We haven't yet—we haven't been able to make that much better cement yet.

Q. Would you just tell us, approximately, what the consumption of cement is in the territory immediately surrounding your mill, compared with your capacity to produce cement?

A. It is very low; it would run, I would say, not over 5 percent. We are not in a thickly populated community.

29596 Q. Are any of your sales made at f.o.b. mill prices, Mr. Davis?

A. No.

Q. Would you tell us, if you know, whether Superior has ever sold cement at f.o.b. mill price?

A. Not to my knowledge.

Q. And would you tell us why sales are not made f.o.b. mill?

A. That is a service we must give our dealers,—we must give them a delivered price, and we have to make a delivered price so the dealer will know what the cement costs him.

Q. Would you tell us, if you know, whether any of your dealers have objected to your selling to them at delivered prices?

A. No, sir.

Q. At what price do you sell the United States Government?

A. Do you mean at a mill price or delivered price?
Q. Yes.
A. At a delivered price.
Q. And how does the delivered price you sell to the Government at some given destination compare with your commercial price at the same point?
A. It is the same as our commercial price.
29597 Q. Why don't you give them a lower price?
A. Well, we do not consider the Government—we have never—entitled to a special price any more than the taxpayers that we sell who are the dealers.
Q. Would you tell us approximately what percentage of your shipments have been shipments to the Federal Government?
A. Very small: I would say not to exceed 2 percent at the very most; that is, direct to the Federal Government.
Trial Examiner Norwood: Did you give us your mill capacity,—annual capacity?
The Witness: About a million tons.
By Mr. Withrow:
Q. A million tons?
A. A million barrels; pardon me.
Trial Examiner Norwood: A million barrels.
By Mr. Withrow:
Q. We did not ask him that, Your Honor.
A. We could have run over a million barrels if we had to.
Q. Then the million barrels is an operating figure?
A. Yes, we consider it a million-barrel plant.
Q. Would you tell us whether or not your selling on a delivered-price basis is the result of any agreement or understanding with any of your competitors?
A. No, sir; it is not.
Q. Or would you tell us whether or not any of
29598 your policies with respect to sales to the United States Government is the result of an agreement with any of your competitors?
A. No, it is not. We may have during N.R.A. adopted some of the policies that our competitors had that we did not know about before, but there is no agreement.
Q. Now, to whom do you sell the greater portion of your business?
A. The dealer business is the business that we endeavor to get mostly.

Q. And what function does the dealer play in marketing your cement?

A. The dealer is a very important function. The dealers, in large communities, maintain their own individual sales organizations, they cover that community thoroughly. They know away ahead of time, usually, when a job is coming up, and their men get on that job. They can also, that is, dealers in large communities, store considerable cement and give much better service than we can give through shipping direct from the plant to the user of the cement. In fact, he is a real asset in the cement industry.

Now, in the smaller communities they can't handle the business as well as they can in the larger communities, but they can do a much better job than we can do if we try to cover that business directly.

29599 Q. Would you tell us, if you know, whether or not any of your competitors sell to persons whom you won't sell as a dealer?

A. Well, of course, I do not know definitely; I know that people we would not sell as a dealer gets cement from some place other than us.

Trial Examiner Norwood: What do you do in a case like that, then? Do you meet the competition by selling this person?

The Witness: Well, there are a good many reasons for not selling a dealer, if Your Honor please. One 29600 might be for credit reasons. Another might be because we do not consider him equipped sufficiently to take care of the trade in that community, such as we feel he should do. If we do not take on a dealer we do not take him on just because somebody else does. If we refuse to sell a dealer we just do not sell him.

By Mr. Withrow:

Q. And the fact of whether or not a competitor sells him would not make any difference?

A. That has no bearing on it at all.

Q. Now, does the fact of whether or not a dealer is a member of a building supply dealers' association have anything to do with whether or not you sell him as a dealer?

A. No, we do not know who belongs to building dealers supply associations. If we did it would be merely hearsay, and I do not know. We know there are such associations, and they come after us once in a while for a—what they

vail a membership and in order to retain their good will we take a membership, but that is not very often.

Q. As the result of taking one of these memberships are you bound to sell only to dealer members of that association?

A. No, sir; there are no strings attached to it at all.

Q. Have you ever entered into any agreement with dealers or dealers' associations as to what constitutes a dealer, or as to whom you should sell as a dealer?

29601 A. Not to my knowledge.

Q. Have you ever entered into any agreement with any of your competitors, or with any dealers or dealers' associations as to what types of business you will sell through a dealer?

A. Not to my knowledge. I believe there was something in that connection in the N.R.A., but I am not sure of that.

Q. How do you sell W. P. A. business?

A. Well sell it in some localities directly; other localities, through dealers.

Q. And would you tell us why you sell it direct in some localities?

A. Where we sell it direct, we have to because our competitors do.

Q. Does the Superior Company truck cement at the present time?

A. No.

Q. Could you tell us whether or not, to your knowledge, it has ever trucked cement, since you have been connected with the company?

A. We did a little trucking of cement in 1931 or '32, but I went into the question of trucking heavy materials pretty thoroughly, and our conclusion at that time was that it was not economically sound beyond a radius of 35 to 40 miles from the plant, so that we never seriously took up trucking.

Trial Examiner Norwood: Well, do you include in 29602 the practice of selling to trucks at your mill?

The Witness: That was one of the objections, if Your Honor please, when we said it was not economically sound. The trucking industry that we found at the time we considered it was carried on by people who were not financially responsible. In fact, we could not find any that were financially responsible in the heavy industries. We could not rely on deliveries if they would buy at the mill, and

we just refused to go into the trucking business because we came to the definite conclusion it was economically unsound for heavy industries.

By Mr. Withrow:

Q. Have you ever sold a large percentage of your shipments in this way in territory within 35 or 40 miles of your mill?

A. Well, there is hardly any business in that radius. The largest towns, the largest two towns are the cities of Portsmouth and Ironton, and they are not large towns.

Q. Do you recall whether any dealers complained to your company that they did not like trucking?

A. Yes, I think we had some dealers say that they did not want to depend upon trucking.

Q. Now, did you discontinue trucking as the result of any agreement with your competitors?

A. No, sir; we never had any agreement with our competitors.

29603 Q. Or, did you discontinue trucking as the result of any agreement with dealer associations?

A. No, sir.

Q. Will you tell us whether or not Mr. W. W. Campbell ever contacted you, or your company?

A. Not to my knowledge.

Q. Did Mr. L. I. MacQueen ever contact you?

A. Not to my knowledge.

Q. Did Mr. E. J. Holway, as head of the Ohio Builders' Association, or Mr. E. C. Kinney, of the same organization, contact you about the question of discontinuing trucking?

A. Not to my knowledge.

Q. Would you tell us whether or not you discontinued trucking because of any pressure put upon you by any of your competitors?

A. No, sir.

Q. Would you tell us whether or not any railroad official came to you, or your company, to discuss with you the question of short-haul rates, and the elimination of trucking?

A. No, sir; not to my recollection.

Q. Would you tell us whether or not the Ironton mill continued to truck after you discontinued trucking?

A. I couldn't answer that question. I was told that the Ironton mill did some trucking at one time.

Q. But you don't know whether that was before or after?

29604 A. No, sir.

Q. Did that have anything to do with your decision?

A. No, sir.

Q. Would you tell us whether or not you have ever made any shipments of cement by barge?

A. Yes, we have shipped to the river and by barge down the river, not very much, but we have done it, where we had an opportunity to do it.

Q. If some customer asked to make delivery by barge would you ship it that way?

A. Yes, sir.

Q. Would you tell us whether or not you sell in competition with foreign cement?

A. No, we do not.

Q. Have you any agreements with any of your competitors with reference to that subject?

A. No, sir.

(The foregoing testimony beginning with "Would you tell us whether or not" was adopted by Utah and Standard.)

Q. Is the Superior Cement Corporation a member of The Cement Institute, Mr. Davis?

A. Yes.

Q. Do you recall whether or not it was a member when you became associated in 1931?

A. I believe that we joined in 1931,—maybe they became a member in 1930, I am not sure; but I know we have been members for a good many years.

29605 Q. Would you just tell us briefly whether the Wellston Iron Furnace Company and the Superior Cement Corporation are the same in individual—

A. They are the same corporations with a change in name.

Q. Well, has it always been the Superior Cement Corporation since you have been associated with it?

A. No, I changed it.

Trial Examiner Norwood: That is Superior Corporation?

Mr. Withrow: Superior Cement Corporation.

The Witness: Superior Cement Corporation. I changed the name, I believe, in 1932 or 1933. It used

to be—it used to have an iron furnace in connection with its business that was eliminated some years ago.

By Mr. Withrow:

Q. Well, have any of the Superior Cement Corporation's officers served as officers of The Cement Institute?

A. No.

Q. Have they ever served on any Institute committees?

A. No.

Q. Have representatives of the Superior Cement Corporation ever attended Institute meetings?

A. They have occasionally.

Q. Did the Superior Cement Corporation have anything to do with the Institute's preparation of freight rate books?

29606 A. No.

Q. Or with the preparation of the N.R.A. Code for Fair Competition?

A. No.

Q. Was the Superior Cement Corporation ever represented on the Code Authority?

A. No.

Q. Did it assist in the preparation of the Code?

A. I am sure they did not; I have no recollection of it.

Q. Now, did you file prices under the N.R.A. Code?

A. Yes.

Q. Mr. Davis, do you recall a protest filed by the Superior Cement Corporation against a proposed new mill in southern Ohio?

A. Yes, I do.

Q. Would you tell us the circumstances?

A. That I saw—I noticed a clipping in the newspaper with reference to such a mill, and I got in touch with Mr. Kanangeiser regarding it, and he apparently had the same information as I did, and we decided to protest the construction of the mill under the provisions of the

29607 Cement Code, which provided, as I understood it, at the time, that you could protest the erection of any new cement plants and the President would approve or disapprove the protest ultimately. The President of the United States.

Q. Well, why did you protest?

A. Well, under the conditions at that time, we felt that there was ample production of cement to take care of the supply—to take care of the demand for it.

Trial Examiner Norwood: Was this proposal to erect the cement mill with private capital?

The Witness: Yes.

Mr. Withrow: Your Honor, in connection with this, I would like to offer in evidence a photostatic copy of the Federal Trade Commission's Exhibit 415-42. The paper was submitted—or, rather, was selected by Counsel for the Federal Trade Commission from the files of The Cement Institute, which were made available to them as the result of a subpoena duces tecum served upon The Cement Institute for certain papers, a portion of which documents have since been admitted in this case.

We offer at this time, in order to complete a picture, a portion of which the Counsel for the Commission introduced in evidence,—I am referring now to Federal Trade Commission's Exhibits 415-41 and 573-L,—and I be-
29608 lieve I would also offer at this time 573-M, which was the letter which is referred to as an enclosure,—and 573-L, in order to complete that picture. (handing documents to Mr. MacIntyre).

The Reporter: Will you desire to give them a Respondents' number, Mr. Withrow?

Mr. Withrow: I suppose they should have a Respondents' number.

(The documents referred to were marked for identification "Respondents' Exhibits 1851 and 1852.")

The Reporter: They are marked "Respondents' Exhibits 1851 and 1852," for identification, Your Honor.

Mr. Withrow: Respondents' Exhibit 1851, Your Honor, being formerly marked as Commission's Exhibit 415-42, and Respondents' Exhibit 1852 being formerly marked as Federal Trade Commission's Exhibit 573-M, for identification.

Mr. MacIntyre: Your Honor, we have no objection to these two documents, Respondents' Exhibit, for identification, 1851, and Respondents' Exhibit, for identification, 1852, provided that they are not to be used as vehicles for later claiming on the part of the Respondents' Counsel that they are transmittal letters for certain data, and that the data should be received in evidence because the transmittal letter is so received, but as to the letters themselves we have no objection; but as to a lot of statistical
29609 data which one of them did transmit we would have objection if it is offered on the ground that it is the data transmitted by the letter that is now in evidence.

Trial Examiner Norwood: You mean that there might be something else be offered to complete this picture?

Mr. MacIntyre: Yes, yes, but we have no objections to the letters themselves as such.

Trial Examiner Norwood: Well, I think that that is a hill we will climb when we get to it.

They are received as marked, Respondents' Exhibits 1851 and 1852.

(The documents referred to, heretofore marked for identification "Respondents' Exhibits 1851 and 1852," were offered and received in evidence.)

29610 By Mr. Withrow:

Q. Mr. Davis, would you tell us, if you know, whether or not the selling and producing costs of cement have increased since 1933?

A. Yes, they have.

Q. What have been the causes of these increases?

A. Increases in wages, increases in materials and supplies, increases in plant equipment.

Trial Examiner Norwood: Now, I don't think—

Mr. MacIntyre: Does my general objection cover that?

Trial Examiner Norwood: Possibly, but I don't think that anything further than the variation of costs would be admissible here. I do not think that you want it to be.

29611 Trial Examiner Norwood: I do not think that that is relevant, and I think that the objection covers it, and I will sustain the objection.

The Witness: I might add to that, Your Honor please, the increases in taxes have been very material.

Trial Examiner Norwood: I shall allow the motion to strike that answer and sustain the objection to the question.

By Mr. Withrow:

Q. You have said that sales costs increased since 1933. How have the sales costs increased?

29612 A. Sales costs have increased in several particulars. There is the cost of the traveling man, increases in costs,—hotel costs are higher than they were.

29613 Q. Would you tell us, Mr. Davis, whether or not you have had to increase your sales costs in order to secure business in your market?

A. Yes, our sales force has had to be increased so that they could keep in closer contact with the trade.

Q. You said that you had to. Is that because of any action of your competitors?

A. Yes, it was required because our competitors,—the competition was very severe, has been, always has been, as far as I know, but it is always more severe when depressed conditions are on than when we have normal times.

Q. Mr. Davis, well, how has this competition of your competitors expressed itself,—I mean, how has it affected your company?

A. Well, lowered net to our company, loss of business.

Q. Has it kept the price of cement down?

29614 A. Yes, as I say, lowered net, kept the price of cement down; much lower, in my opinion, than it should be. That probably is the most direct result of severe competition. You can't get a reasonable price for a product under very severe competition.

Q. Now, would you tell us whether or not, when you use the word—by the word "price" you mean "mill net" or "delivered price"?

A. Delivered price.

Q. In your experience, what have you observed with reference to lowering of your prices affecting your competitive position, yielding more business?

Mr. MacIntyre: I object, Your Honor please. There has been no foundation laid showing that this witness lowered prices.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Have you ever lowered prices?

The Witness: Yes, sir.

29615 Trial Examiner Norwood: And you can give us the results of that as reflected in returns.

The Witness: Our experience has been that if we lower a price, make a price lower, the market declines in any given market.

Trial Examiner Norwood: Now, don't say "when we do it," say "when we did."

The Witness: When we did that.

Trial Examiner Norwod: If you did, what was the result.

The Witness: Our experience has been when we did that that our competitors would merely pick out another market and do the same thing, as far as we are concerned, and take business we would normally get in that market,

and if it continues indefinitely it results in cut-throat competition which ruins not only the company but the industry generally. That has been our experience.

Trial Examiner Norwood: What time was that? What time was that?

The Witness: What time?

Trial Examiner Norwood: Yes.

The Witness: We have done it from time to time, Your Honor please, lowering a price in a certain market, and our experience has been that our competitors will either go lower than the price we made at times or pick out
29616 another market in which they would make a lower price where we had business.

By Mr. Withrow:

Q. Well, has it resulted, in the past, in an increased volume of business to your company?

A. No, no. It might increase in one given spot, but it would decrease in another spot, so that the volume in the plant would not be increased.

Q. Would you just tell us what your general policy is at the present time, Mr. Davis?

A. Our general policy at the present time—that is, the general policy since I have become president of the company, is to meet market conditions as to price.

Trial Examiner Norwood: Then, when you go lower, you think that—

The Witness: How?

Trial Examiner Norwood: If you go lower you think that it just simply provokes a cut on the part of your competitors?

29617 The Witness: Well, it forces it.

Trial Examiner Norwood: Yes.

The Witness: There are times when a reduction in price won't affect a certain dealer because he has depended upon, maybe, one particular company to supply him with cement for years; he is an old customer, and it might not get us any business, but would result in the price cut from the other company, because the dealer would immediately report it to his shipper.

Trial Examiner Norwood: Yes.

The Witness: So, it might not get us any business at all; merely result in a price cut that he has obtained.

29618 *Cross-Examination by Mr. MacIntyre.*

29621 Q. Let's see, now; You have no knowledge, do you, Mr. Davis,—or do we understand from that testimony that you have just given that you have no knowledge of any use in the cement industry by you and your competitors,—by your company and your competitors,—of any figuring points or basing points in figuring delivered prices?

A. I understand the basing-point system has been used in the cement industry, yes, for years.

Q. But you know nothing about it and you do not
29622 know that your company has ever used it; is that your testimony?

A. Oh, no, no. Our company uses the basing-point price.

Q. But in this particular instance in 1933 it did not use it, is that what you want us to understand, in any particular in figuring this increase in price?

A. Well, I would never attempt to figure the delivered price of cement. That is a job in itself. That is a traffic man's job. That is his job. He has got to take the figures and make them all up and figure the delivered price, and every cement company, I presume, would have to have a man who would do that figuring for them, but I would not attempt to do it.

Q. You have never done it?

A. No, sir.

Q. And you do not know anything about the factors that are used in calculating such quotations?

A. Sure, freight rates always have to be considered.

Q. And what else?

A. Well, freight rates is the thing that is considered.

Q. Well, do you mean to say that the only thing you put into your price is the freight rate, and, if so, from where?

A. Well, Mr. Paulson, I never would attempt to figure delivered prices on cement.

Q. You have never done so?

A. No, sir; I have never made a figure.

Q. Who does that in your company?

29623 A. We have a traffic man to make those figures.

Q. It is Mr. Con Hearn,—does Mr. Con Hearn, your sales manager, do such calculating for you?

A. Mr. Con Hearn can do it, I have no doubt.

Q. Well, isn't it a fact he does do it at times?

A. I think probably at times he does do it, certainly assist in doing it.

Q. Isn't it a fact, Mr. Davis, that Mr. Con Hearn has shown you from time to time lists of basing points, basing-point prices that he uses and instructs his salesmen to use in calculating delivered prices?

A. I never went into the basing-point system with Mr. Hearn.

Q. You never mentioned it to him?

A. No, sir.

Q. And he never mentioned it to you?

A. Oh, he has mentioned basing points, sure.

Q. And basing-point prices, but you never talked with him about it, he just talked to you about it; is that correct?

A. At one time Mr. Hearn attempted to show me how to figure it, and I said, "I don't want to be bothered with that."

Q. You let him do it?

A. Yes, sir.

Q. And you know nothing about what they are?

A. No, I would not attempt to tell you, Mr. Paulson, what the different basing points are; I don't know.

29624 Q. Or what figures are used as prices or figuring levels at those points?

A. No, I do not know what the basis of it is.

Q. Now, as to these freight rates that are applied to this in the calculation of delivered prices, where do you get those?

Mr. Withrow: Your Honor, I object. This was not gone into on direct examination. As a matter of fact, the method in which prices were computed, if, in fact, they are computed, was not gone into. There are only one or two matters gone into with this witness, and I think Counsel for the Commission is wasting time, and I object to it as improper cross-examination.

Mr. MacIntyre: There has been considerable testimony given by this witness on direct examination as to the method of price making by his company. Now, we want to know just exactly how the details of that price making are involved.

Trial Examiner Norwood: I shall overrule the objection.

Mr. MacIntyre: Will you read the question back to the witness?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

By Mr. MacIntyre:

29625 Q. Now, as to those freight rates that are applied to this in the calculation of delivered prices, where do you get those?

A. I believe that The Cement Institute make up the book showing the freight rates, which are subject to correction from time to time, and are corrected from time to time.

Q. You use that—

A. And, I think that's the book that is used in making up the freight rates.

Q. That are used in these prices?

A. Yes.

Q. And Mr. Con uses that book, does he?

A. Mr. Hearn, you mean?

Q. Mr. Con Hearn, I mean.

A. Yes, I have no doubt that he does.

Q. What about his salesmen? He gives them to the salesmen? That is, the salesmen that operate under him, to use also, doesn't he?

A. I am not sure whether he gives them that book, or not.

Q. He has not informed you, as the president of his company, as to the method that he used?

A. Methods that he has used in what, now?

Q. In carrying out his sales practices?

A. I turn the complete sales over to Mr. Hearn. That is one of the first things that I did when I took complete charge of it.

29626 I have found, in my experience as an executive, that the way to get efficient service is to give full responsibility to the head of the department.

Trial Examiner Norwood: No use of going into that.

The Witness: Well, he asked, if Your Honor please.

Trial Examiner Norwood: You told him that you turned it over to Mr. Hearn. That is all that is important here.

By Mr. MacIntyre:

Q. Is that true, also, as to the handling of your shipping department?

A. Yes, sir.

Q. Who is the head of your shipping department,—billing department?

A. A man by the name of Shaw handles the billing and the shipping.

Q. What is his first name,—initials?

A. Can I ask, refresh my recollection here on it?

Q. Yes.

(Witness leaves the stand and consults a gentleman in the back of the room, and returns to the witness stand.)

A. Mr. C. P. Shaw.

By Mr. MacIntyre:

Q. Mr. C. P. Shaw?

A. Yes.

29627 Q. What is his title?

A. He has not any title; we don't give him a title.

Q. He is just the head of the shipping department?

A. He just looks after the shipping.

Q. And, generally, what are his duties?

A. His duties consist of giving the orders to the mill, and looking after the routing of cars, and whatever work is necessary in connection with the shipping of the cement.

Q. You don't know anything about the details of his work, though,—you just leave it up to him as you do with—

A. Not to him, no; he comes under the sales department.

Q. But that is left up to Mr. Con Hearn, then?

A. To Mr. Con Hearn, yes.

Q. You know nothing about the details of this work, in practice?

A. The only thing I went into, Mr. Paulson, was the amount of time it took to do it, the number of man-hours necessary to do it.

Q. To do which?

A. To take care of the shipments.

Q. And, beyond that, you know nothing about the details—

A. No.

Q. —of the work,—of the manner in which the work is handled?

A. No, I don't.

29628 Q. Do you supply Mr. Hearn, and these men under him in the shipping department, and in the sales department, with official railroad tariffs for their use in checking railroad rates?

A. Those are supplied by the railroad company.

Q. And your departments have them for use in checking rates?

A. I am pretty sure that they have, yes.

Q. I believe you said that you served quite a number of years as secretary of your company, and since then as president?

A. That's right.

Q. How much has your company paid to The Cement Institute for its membership?

Mr. Withrow: Your Honor, I object to that question, this matter,—it was not gone into on direct. I do not see how it is material or relevant to any of the issues of the complaint, which, as I recall, contains something as to agreements to fix prices.

We did not ask him anything about dues of the Institute, services rendered by the Institute, or anything of that character. I do not think that we should go into that on cross.

Counsel for the Commission is obviously doing this to waste time until we adjourn.

Trial Examiner Norwood: You brought out that he was a member of the Institute.

29629 I think he might bring out those details on cross-examination, to test his knowledge on that subject.

Mr. Withrow: Well, Your Honor, I do not see where it has any bearing upon the issues in the case. If there was such bearing, I think that Counsel ought to make an offer of proof to show us, and if we are going into this, I think that the year should properly be limited to a time during 1937 prior to this case, because I do not think it is very material to go into that.

Trial Examiner Norwood: The objection is overruled.

Mr. MacIntyre: Will you read the question?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. In dollars and cents?

By Mr. MacIntyre:

Q. In dollars and cents.

A. I think it runs between three and five thousand a year, depending upon the number of barrels shipped.

Q. Is your company a large company or small company in the cement industry,—as you know it?

A. I don't think we consider ourselves a large com-

pany, but I don't like to admit we are a small company. I would say we are about average.

Q. Would you say that your dues in the last years of its membership in the Institute have been more than
29630 they were when they first went in?

A. You mean in the last years—you mean in years immediately prior to that, as compared—

Q. Let us say as 1931—'30 or '31, when it first joined, or 1932? That is, I believe you said you came with the company in 1931?

A. That's right.

Q. So let us take 1931 and 1932.

A. Yes, I believe they have run slightly more the past few years.

Q. Going up, then—

A. Not because of the increase in the amount of dues, it would vary, but business has been a little better in the last two or three years than it was in the years 1932 and 1933. I mean, the number of barrels shipped.

29631 Q. What is the rate per barrel that you pay The Cement Institute as dues?

A. I think it is one cent a barrel.

Q. One cent?

A. Yes.

29632 Q. What was the total barrelage produced and shipped by your company during the year for 1937?

A. Four hundred and sixty some odd thousand.

Q. Four hundred and sixty some odd thousand?

A. Yes.

Q. And it is your understanding that from the rate per barrel plus that barrelage we can get your Cement Institute dues for that year; is that correct?

A. Yes.

29634 Q. Mr. Davis, you have stated that your company has had, not, and does not now have, any agreement or understanding with its competitors concerning pricing, marketing policies, sales policies; is that correct?

A. That is correct.

Q. Would you say that they have not had any communications with their competitors,—representatives of competitors discussing such things?

A. Not to my knowledge.

Q. Well, when you spoke about agreements and under-

standings, just how far were you committing yourself on that, and how far does your knowledge go?

A. We have no agreements to be binding on the company; if there is such a thing I do not know about it.

Q. Well, do you know whether or not there was ever any understanding,—whether binding or not,—be-
29635 tween your company and your competitors?

A. No, I do not know of any understanding.

Q. Would Mr. Kanangeiser have told you of all understandings that he had with his competitors on such matters when he was president of your company?

Mr. Withrow: We object, Your Honor. It assumes something that is not in the record, to-wit, that Mr. Kanangeiser did have agreements, and I think, therefore, it is an improper question. I object to it. It does not correctly state the record.

Trial Examiner Norwood: I understood him to have asked him if he would have told him in case he had had any.

Mr. MacIntyre: Yes; I will amend the question to that effect.

Trial Examiner Norwood: Answer the question?

A. Yes, I think he would.

By Mr. MacIntyre:

29636 Q. How do you know that?

A. Well, I talked over matters with Mr. Kanangeiser quite often generally.

Q. And you are able to speak, now, that he never had any understandings with his competitors?

A. Not to my knowledge.

Q. Well, I am asking for a positive statement now as to whether or not you do know whether he did have any understanding with his competitors.

Mr. Leisure: The question has been answered.

Trial Examiner Norwood: I think he has a right to ask him that.

Mr. Leisure: I do not know how he can go beyond his knowledge.

Trial Examiner Norwood: He can clarify the situation as to how far his knowledge goes.

The objection is overruled.

Mr. Withrow: Which of Mr. MacIntyre's three questions, now, is the witness to answer?

Trial Examiner Norwood: Read the last question.

Mr. MacIntyre: Read the last question.

(Question read.)

A. He had no understanding that would be binding on the company.

By Mr. MacIntyre:

29637 Q. Well, can you state,—will you testify now that he had no understandings—that is, unqualifiedly so testify?

A. Yes, I think I can testify to that. I think I would have known it if he had any understandings.

Q. Will you also testify that he had no conversations and communications with his competitors concerning those matters—that is, prices and marketing policy?

A. Well, I could not testify as to Mr. Kanangeiser's conversations with competitors, if I was not present at the time. I do not know what his conversations might have been.

Q. Well, can you tell the results, then, of conversations and communications that he had with his competitors?

The Witness: Read that question again.

Mr. Leisure: I object to that question. He has not said he had any, so he could not testify to the results of conversations that he never had. I object to that.

Trial Examiner Norwood: Yes. The objection is sustained.

By Mr. MacIntyre:

Q. Mr. Davis, I show you Commission's Exhibit 415-41. —is that Mr. Kanangeiser's signature to that letter?

A. I believe it is, yes.

Mr. Withrow: Could I see these documents?

Mr. MacIntyre: When we complete the cross-examination. I am going to be using that again in a moment

29638 or two.

By Mr. MacIntyre:

Q. I now show you Commission's Exhibit 971-12-K, 12-L, and 12-M,—is that Mr. Kanangeiser's signature at the end of that letter?

A. Yes, I believe it is.

Q. And I also show you Commission's Exhibit 971-14-K and 14-L, and ask you whether or not you can say the same thing with respect to the signature at the end of that letter?

A. I believe it is.

Q. And I ask you,—I show you Commission's Exhibit

971-17-P and 17-Q, and ask you if you do not recognize the signature at the end of that letter as Mr. Kanangeiser's?

Q. Do you recognize that as Mr. Kanangeiser's signature?

29639 A. I believe that's Mr. Kanangeiser's.

By Mr. MacIntyre:

Q. I show you Commission's Exhibit 1678 and ask you if you also recognize the signature at the bottom of that letter as that of Mr. Kanangeiser (handing document to witness)?

A. (Witness examines document at length) Yes, I think that is Mr. Kanangeiser's.

Q. He was president of your company, as I understand, during the period from 1931 until June, 1939,—I believe you testified on direct?

A. That is correct.

Q. Yes.

A. The latter part of 1931.

Q. And you were in the company with him through all of that period; that is, May, 1931, until he left the company in June of 1939?

A. That's correct.

Q. And yet you have no knowledge of any communications that he had with any of his competitors or representatives of his competitors?

A. No, sir; I have not.

Q. Or any discussions, or understandings that he had with his competitors?

A. No, sir. As a matter of fact, I wouldn't have permitted it if I had known about it, not because of the

29640 legal question involved, because—because I—I had been associated with companies who have been permitted by law to have agreements and understandings, and they don't amount to anything after they are made.

Q. Since you have seen these exhibits that I have just shown you that Mr. Kanangeiser signed, you are willing to admit, now, that he did have communications?

A. Well—

Mr. Withrow: Your Honor, we object to that question. Both letters speak for themselves as to what they show.

Trial Examiner Norwood: He could ask him if he is willing to admit that he might have had communications which had not come to his knowledge.

Mr. MacIntyre: I want to see how far the witness—

Trial Examiner Norwood: That question would go to his previous testimony.

Mr. MacIntyre: I want to see how far the witness goes, the knowledge he had.

Mr. Withrow: Most of them are communications, Your Honor, addressed to The Cement Institute.

Trial Examiner Norwood: Yes.

Mr. Withrow: I do not see how—

Trial Examiner Norwood: I think that Counsel might re-form the question.

By Mr. MacIntyre:

29641 Q. Well, Mr. Davis, are you prepared now to testify, in the light of what you testified on direct, that no representative of your company had communications and conversations with your company's competitors concerning prices, and pricing methods, and marketing policies,—sales practices?

A. Well, I didn't read those letters through. I would have to read those letters through carefully before I could answer your question.

Q. Well, of course, you answered Mr. Withrow's questions without reading any of the letters. Now, I want to know what your answer would be to my question without reading anything.

A. Well, I don't—

Q. I want to know whether or not you want to change any of your testimony that you gave him.

A. I don't think—I think that Mr. Withrow's question was addressed as to whether or not I had the communications.

Q. No, I understood it applied to your company and all of its employees and officials,—any one working with your company.

Mr. Withrow: Your Honor, I did not object to Mr. MacIntyre's first question, although it misstated the record, because I thought we could save time by not doing it. I must object now. It does not state the record as to what my question was, and as to what this witness' 29642 testimony was, and I think it is an improper question.

Trial Examiner Norwood: The objection is overruled.

A. My recollection of the direct examination was that I did not so testify.

By Mr. MacIntyre:

Q. Well, what is your testimony now?

A. My testimony is that in so far as I had any knowledge, there was never any agreements with any competitors in connection with prices—or the marketing of cement.

Q. Well, are you prepared to say that there have been no agreements, understandings, conversations, and communications between representatives of your company and representatives of its competitors concerning such matters?

Mr. Leisure: Now, which of those questions does Mr. MacIntyre want answered?

Trial Examiner Norwood: I think it is perfectly
29643 clear.

Mr. Leisure: Conversations is one thing, and agreements another, and I do not think that he ought to ask him another question—

Mr. MacIntyre (Interposing): He can qualify it in any way that he might desire.

Trial Examiner Norwood: I think he may answer.

A. There have been no agreements that would be binding on the company.

By Mr. MacIntyre:

Q. What about understandings, conversations, and—

A. No agreements, understandings, or conversations,—

Q. —or communications?

A. Or communications—that would be binding upon the company.

Trial Examiner Norwood: Well, have there been any that were not binding on the company?

The Witness: Well—

Trial Examiner Norwood: Can you say?

The Witness: Your Honor please—

Trial Examiner Norwood: What do you say?

29644 The Witness: It is a pretty difficult question to answer. We have probably 200 employees, and some of which are officers, and some of which are representatives, and it is a pretty difficult question to answer as to what conversations, or understandings, that any or all of these people might have had with somebody, except to say that they had none that would be binding upon the company.

By Mr. MacIntyre:

Q. Does your last answer apply to any understandings, communications, or conversations that were carried on between the president of your company and representatives of your company's competitors?

A. Well, it refers to my last answer. May I have the last answer read?

(Answer read.)

A. Is that the answer you refer to?

By Mr. MacIntyre:

29645 Q. Yes, that is the answer I am referring to now in my question.

A. The same answer would apply.

Trial Examiner Norwood: Read the last question.

(Question read.)

The Witness: That is the last answer.

By Mr. MacIntyre:

Q. Your answer is to that effect, although you were his subordinate for seven out of the eight years you have been with that company; isn't that true?

A. I do not think that is true; no, sir. I represented practically all the outstanding stock.

Q. I believe you testified on direct, though, that the president of your company is its chief executive.

A. That is correct.

Q. You have stated that you do not quote f. o. b. mill price because none of your customers never asked such; is that correct?

A. I do not think I so testified.

Mr. Withrow: Your Honor, that incorrectly states the record, I object to the answer on that ground.

A. I do not think I so testified. My recollection of my testimony, and as the facts are, that we have never made any price except f.o.b. point of delivery.

By Mr. MacIntyre:

29646 Q. Well, you stated your reasons for not quoting f.o.b. mill. Will you please refresh us on what those reasons were, as you stated them on your direct examination?

A. Well, our reasons were because we felt that was a part of the service that we should give the dealer, a practice growing up for years, and we had to do it.

Q. And that is true irrespective of the fact that the customer would like to buy at the mill?

Mr. Withrow: Your Honor, there is no proof in this record that this company's customers would like to buy at the mill. You have been referring to the dealers and what the dealers want, and what service he has to render to dealers, and there is no testimony in this record that would warrant that.

I object to the question.

Trial Examiner Norwood: Is there any testimony in this case that some customers wanted to buy it at the mill?

Mr. Withrow: There is no reference to any desire of any dealer-customer of this Respondent wanting to buy at the mill, and that is the particular question. Whether some other customer might want to buy from some other company, has nothing to do with it.

Trial Examiner Norwood: He may ask him with respect to his policies whether or not he would sell it.

29647 I think he may bring that out, the particulars there as to his policy.

Mr. Withrow: I object to him misstating the record, that is all, Your Honor. I do not object to this line of inquiry.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Even, though, if you put it that way, too—even though the customer might want to buy it at the mill.

Mr. MacIntyre: I will amend it.

Trial Examiner Norwood: Can you answer it that way.

The Witness: Well, I will attempt to answer it, if Your Honor please.

Building up a business takes a long period of years to build it up, and if it is built up on a certain policy, the fact that one or two customers might want to change their former policy of selling at delivered prices would not be any justification for changing that policy even though he asked for a mill price.

Trial Examiner Norwood: Now answer his question: Is that true or is it not true?

The Witness: You will have to read the question again.

Trial Examiner Norwood: You gave us the explanation and then did not give us the answer.

29648 The Witness: Well, I do not think I can answer the question because it implies something I do not know ever existed, if it ever existed or not.

Trial Examiner Norwood: Well, all right.

By Mr. MacIntyre:

Q. Well, aren't you aware, Mr. Davis, that the Federal Government has requested your company to submit to its bids f.o.b. your mill?

A. Yes, I understand that they have.

Q. What are your reasons for refusing to bid in that case, or in those instances?

Mr. Withrow: Your Honor, I think the foundation should be laid that this witness had something to do with those invitations, and I think it should be referred to specifically.

Trial Examiner Norwood: The objection is overruled.

A. Well, I do not think we bid. Our percentage of Federal Government business has been very low, and I do not recall specifically any individual cases where we bid on Federal Government business.

By Mr. MacIntyre:

Q. Well, I call your attention to Commission's Exhibit 1394, that is an instance in which you were invited to bid and did not bid. I am asking you now for your reasons why you did not bid in such cases?

29649 Mr. Withrow: If this witness is the one that decided not to bid, I have no objection, but there is no foundation laid yet for any question about a specific invitation.

Mr. MacIntyre: We questioned the foundation this morning, and it was considered broad enough to ask him all about the policies of the company.

Trial Examiner Norwood: Well, I think he may tell us about his policy in that respect,—about this situation, if he can.

The Witness: This particular bid was never brought to my attention.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. You did not know the reasons for your company's refusal to bid in such instances as is shown by that exhibit?

A. None except that they did not feel that they wanted to change their former policy of selling at delivered prices.

Q. In other words, they wanted to stick to the policy of bidding delivered prices?

A. Yes, sir.

Q. That is the only reason that you know of at this time?

A. Yes.

Q. I believe you have testified that you have made, or your company has made its selection of its dealers independently of its competitors, or any other outside
29650 influences, as well as deciding the classes of business that it will sell direct as well as those that it will sell through dealers; is that your testimony?

A. I do not think I so testified. My recollection is that we said we met competition where it was, and in connection with the W.P.A. bidding we bid in some cases direct because our competitors did, and we were forced to do it for that reason.

Q. Are you acquainted with the details of your marketing policy?

A. Not the details, no.

Q. You do not know, then, as to what classes that your company does sell direct to the consumer and what classes of business that it will refuse to sell direct, and will sell to the dealer expecting him to re-sell to such customer?

A. No, not the detail. The only thing I can testify to is we try to build up our dealer business because our dealer is a very important asset in the distribution of cement.

Q. Mr. Davis, I am showing you Commission's Exhibit, for identification 2385-A to G. I will ask you to state whether or not you recognize that, and, if so, as what?

A. Well, it is the first time I have seen it.

Mr. Leisure: I submit that he cannot answer the question, if that is the first time that he has seen it.

By Mr. MacIntyre:

29651 Q. Mr. Hearn, your sales manager, never showed you that document, or one of which it is a copy?

A. I have no recollection of it.

Q. You do not know, then, at this time whether or not that represents an outline of your policies of marketing cement?

A. Not the detail of it; no, sir.

29653 Q. Do you know, Mr. Davis, whether or not that your salesmen carry documents similar to this document marked for identification as Commission's Exhibit 2385-A to G?

A. What is the Exhibit 2385-A to G? Is that the one over there?

Trial Examiner Norwood: What is it?

Mr. MacIntyre: The one I just showed the witness.

A. No, I don't know.

Trial Examiner Norwood: Is that the one you just handed—

Mr. MacIntyre: Counsel have it over there.

A. I don't know whether they carried them or not.

By Mr. MacIntyre:

29654 Q. You are not very well acquainted with what your salesmen carry as part of their sales equipment?

A. No, sir; I am not.

Q. Or what their instructions are, specific and detailed instructions?

A. Not as to details, no.

Q. Can you testify now as to when, and under what circumstances, and what changes have been made in your marketing policies during the past four or five years?

A. No, not for that length of time. The definite change in our marketing policy that I made when I took over the presidency of the company was to get a better price for the cement than they had been getting, if it was possible to do so, because I felt that the price was low, and it was lower than it was in the same period the year before,—

Q. Well, what I am—

A. —and to meet competition, that was necessary.

Q. When I am speaking, and when I refer to policies, what I meant was the classification of business that you would sell to dealers.

A. Well, that is a detail that I am not familiar with.

Q. You cannot now testify as to when, or under what circumstances, if any changes were made in your policies in that respect,—that is, in details of those policies?

A. No, I cannot.

29655 Q. Coming back to this price change of 1933,—June, I believe, or about July 1st—

Mr. Paulson (interposing): June.

Q. —as is shown by Respondents' Exhibit 1850-B and C, that was as of July 7, 1933; is that correct (handing document to witness)?

A. That's dated July 7, 1933, yes.

Q. That is the effective date of that price change (indicating)?

A. (Witness examines document.) I presume the effective date of that quotation would be July 7th.

By Mr. MacIntyre:

Q. That is, to the best of your knowledge and recollection at this time, that was the effective date as it appears from the information on the exhibit?

A. Yes, that's to the best of my knowledge.

Q. Sice the exhibit carries the date.

A. Yes.

Q. I now call your attention to Commission's Exhibit 1185-C, and point out to you an increase in the Ironton basing-point price of 25 cents on the date of July
29656 7, 1933 (indicating); was it ever called to your attention by Mr. Con Hearn, your sales manager?

Mr. Withrow: Is this exhibit in evidence?

Mr. MacIntyre: Yes, it is.

By Mr. MacIntyre:

Q. Was that change in that basing-point price called to your attention by Mr. Con Hearn?

A. No, it was not.

Q. By Mr. Kanangeiser?

A. No.

29657 Q. I am attempting now to refresh the witness' memory and recollection as to whether or not he has seen price lists that carried basing-point price changes for Ironton, Ohio, as of that date, of 25 cents a barrel—

29658 A. No, sir; I never saw it.

Q. How far is Ironton from your mill?

A. About 17 miles.

Q. Seventeen miles?

A. Yes.

Q. Do you know anything about the application of freight rates from Ironton and from your mill as to whether they are different, or the same, for most locations to which you ship cement?

A. I pay no attention to freight rates, Mr. MacIntyre.

29659 Trial Examiner Norwood: Well, do you know?

The Witness: That is, in view of that I wouldn't have—I couldn't answer the question intelligently.

Trial Examiner Norwood: Well, do you know or do you not know?

The Witness: I do not know what the freight rates are from our mill to the different points to which we ship.

Trial Examiner Norwood: Read that question again.

(Last question re-read by Reporter.)

Trial Examiner Norwood: Can you give us a direct answer to that question without any explanation?

Mr. Leisure: Could we have the answer read to the question?

Trial Examiner Norwood: Let him answer this, first.

The Witness: Well, I would like to hear the last answer as to what I said.

Trial Examiner Norwood: I think you should answer it without hearing the last answer.

Go ahead and answer it.

Do you want the question read again?

The Witness: May I have the question read?

Trial Examiner Norwood: Read it again.

(Last question re-read by Reporter.)

Trial Examiner Norwood: Do you or do you not?

29660 The Witness: Not from actual knowledge, no.

By Mr. MacIntyre:

Q. Mr. Davis, on direct examination you discussed at length costs, and certain other factors related thereto in connection with a price increase that you state your company initiated, and which is shown by Respondents' Exhibit—shown in part by the Respondents' Exhibit 1850-B, C; do you recall?

A. I don't recall that I said we initiated a price. I recall that we said we decided we must get an increased price for our cement.

Q. I understood you to testify that you led with that price change, that you knew of no one in the industry—

A. Well, that's correct.

Q. What?

A. Our company increased the price of cement.

Q. And that there was some relationship to it, and these other factors that I have just described?

A. Relationship, yes, between costs and the reason for increasing the price?

Q. Yes.

A. Yes.

29661 Q. Now, are we clear on your testimony that you led this price advance, or initiated it? You testified on direct that you did.

A. I—

Q. We want to know whether or not you want to change that testimony, or—

A. Why, yes, we increased the price for our company.

Q. Well—

A. I don't know whether you would call it initiation of

price, or what you call it. That's what we did, we increased the price of cement.

Q. Above—

A. Decided to do so the latter part of June, and put it in effect.

Q. And above the prices quoted?

A. Above the price quoted by us.

Q. By others?

A. By us.

Q. You don't know whether or not it was above the price quoted at that particular day by others in the same location?

A. Yes, it was above the price that we found in the different localities in which we shipped, as the market price.

Q. That is, you had not, at the time you notified your trade of this particular price increase, found in the field and among your customers price quotations of your
29662 competitors which had likewise increased the price?

A. That is right. We had not found any such increase.

Q. Your quotation, which is in evidence here as Respondents' Exhibit 1850, is dated July 7th. You say that is the effective date. Did you send it out on that date effective as of that date?

Mr. Withrow: Your Honor, I object to that. There is no testimony about when it was sent out, and if Mr. MacIntyre will look at the quotation he will find it was not sent out on July 7th, as this question assumes. I object to it because it improperly states the record.

Trial Examiner Norwood: I do not see any possible objection to that question.

Overruled.

Mr. MacIntyre: Read the question.

(Question read.)

A. Well, I think the exhibit shows it was sent out prior to July 7th. I am not sure of the date without looking at the exhibit.

By Mr. MacIntyre:

Q. How many days is it your custom to send out quotations in advance of their effective date?

A. I believe they told me that they send it out a few days in advance of the effective date.

Q. Well, what is the policy of your company in that respect?

29663 A. That was apparently one of the policies in existence, so far as the sales department was concerned, at that time.

Q. Well, what is the policy exactly? Is it to send out five days in advance, or what is it?

A. I could not answer that question. I know they gave them some advance notice, but the number of days—

Q. You do not know?

A. No.

Q. You do not know the reason for the advance notice?

A. Yes. I can understand the reason why they would give them advance notice.

Q. What are the reasons?

A. It just is not customary in any line of business that I know of, or have ever been connected with to just arbitrarily increase the price on a moment's notice. Ordinarily, there is a few days' notice in advance.

Q. Do you have any other reason?

A. No other reason unless it was the custom in the cement industry to give advance notice the same as it is in other industries.

29664 Q. If it is the custom in the cement industry, would you consider that sufficient reason?

A. If it had been a custom grown up, the dealer would have a right to expect it.

Q. But you feel that that is sufficient reason if it is the custom in the cement industry?

A. I think it is, yes.

Q. Do you make increases and price decreases as costs of your company increase and decrease, Mr. Davis?

A. No.

Q. What determines whether or not you will or will not increase or decrease your prices?

A. The competition that you meet, unless we become desperate as we were in 1933 when we had to do something.

Q. That is the June, 1933, price increase?

A. Yes.

29665 Q. Well, if they had made no change in their prices and you had announced a 25-cent per barrel increase in yours, would you have continued to quote 25 cents above them in an attempt to get business?

A. We might have continued it for a sufficient length of time to see whether we could make it stick, or not.

Q. What length of time would that have been?

A. Well, that is hard to say. It is pretty difficult to answer. I would not know.

Q. Well, isn't it a fact that it depends on competition as to whether it sticks?

A. Yes, I think probably it does, competition over a period of time.

Q. In other words, if your costs had continued to rise and competition had brought the price down instead of up, you would not have continued to have gone on up, would you?

A. Let me have that question again.

Q. With your price, I would like to add.

A. Probably not.

Q. Well, can't you say whether you would or
29666 would not, being an official of the company as you are?

A. Well, I presume over a period of time that we just have to meet whatever competition we met in the field.

Q. Irrespective of what your costs are?

A. Irrespective of what?

Q. Irrespective of what your costs are?

A. Yes, we might have to ship cement at less than cost.

Q. Can you cite any instances where you lowered your price because of decreasing costs?

29667 Mr. Withrow: Your Honor, we object to that as immaterial, and it is speculative as to whether costs decreased, and they foreclosed us from going into that precise question.

Trial Examiner Norwood: Overruled.

A. I can't cite any specific instance in connection with this particular company where that occurred.

Q. Well, I am talking about the cement company, now, rather than coal or some other industry.

A. They were at the bottom of the market—pretty close to the bottom of the market when we got into the industry, and we never had the opportunity to consider that question as long as we had been engaged in the business.

Q. In other words, there has been no fluctuation at all as to any element of your costs since you have been with the company down from any peak that it had reached?

A. Well, of course, we make efforts continuously to try to decrease the cost,

29668 Q. I am talking about costs now, Mr. Davis. We will get to earnings and profits later.

A. I know, but you are comparing your costs with your profits, as I understand—in other words, your costs decrease, do we decrease the price?

Trial Examiner Norwood: No. I will ask you to read that question and ask the witness to make a direct answer to it.

(Question read.)

Trial Examiner Norwood: Have you ever reduced your price because your costs were reduced?

The Witness: No, we have never gotten our costs down to a sufficient basis where we thought we could reduce the price.

By Mr. MacIntyre:

Q. They have fluctuated downward from peaks that you have reached, though, haven't they?

A. Yes. You mean, now, costs over a period of a year's time?

Q. Yes.

A. Yes.

Q. But you did not reduce the prices to follow that trend?

29669 A. No, because we were already selling below cost.

Mr. MacIntyre: Now, if Your Honor please, we move to strike all of the testimony of this witness that relates to the matter of costs. It is our understanding that you admitted it this morning because it was offered as proof of reasons for price advance that was made. The witness testified on cross-examination that his price advances and his price decreases are not determined by fluctuations in cost, but, on the contrary, by prices which are quoted by his competitors, and it seems to allow that evidence to remain in the record that we are getting into a field that is aside from price competition and outside of the issues here.

We move, therefore, to strike all of his testimony that relates to costs, losses, profits, and such factors.

Mr. Withrow: Well, Your Honor, that is not a legal basis for striking testimony at all. Mr. MacIntyre has not advanced a single reason; as long as the testimony of this witness is as to his reasons as to why that company did what

it did, it is admissible in this case, and properly belongs there. What he may or may not have done in a thousand other circumstances does not change it one iota.

Trial Examiner Norwood: As I recall it, he did not base his price increase,—his reason for his price increase
29670 were not the increase in costs but on account of the financial condition of the company, wasn't it?

Mr. MacIntyre: The witness has just testified on cross-examination, however, that irrespective of costs, irrespective of financial conditions of his company, his prices are going to go up and down as those of his competitors, because he says he can't do differently than his competitors.

Trial Examiner Norwood: Except in that one emergency.

Mr. MacIntyre: He has said even there that he would have kept the price down if his competitors had not; and we consider, therefore, that the material in the record on that point is irrelevant and immaterial to the issues, or any evidence that the Commission has put in. We ask that it be stricken from the record.

Mr. Withrow: Your Honor, I have a hard time believing that Counsel for the Commission is serious in this motion; and unless Your Honor wants a further statement, we won't make it.

Trial Examiner Norwood: Well, I am not sure that some of the details should be struck in view of the statement of this witness, the disclaimer. If he was not responsible or was not conversant with certain details offered as to prices and costs.

29671 Mr. Withrow: Your Honor, the testimony is very clear that this gentleman says he testified—cannot testify as to minute details of how cement is priced, but he did testify that he was well aware of the financial condition of the company, that that had been his interest ever since 1931, that he discussed and was present at the decision about this price increase, that he knows the reasons for the price increase, and I think that he is qualified to do it.

Now, whether he is not qualified to or cannot testify about other matters, does not affect his testimony as long as he knows those facts and acted on them at the time.

Trial Examiner Norwood: Mr. MacIntyre made a prediction earlier in the testimony of this witness, that seems to me more or less came true, but I would have to study it. That is just an impression.

Mr. Withrow: I do not recall Mr. MacIntyre's prediction.

Mr. MacIntyre: Well, I think I recall it, and that is that they were attempting to have this witness to testify as to matters that, according to his very early statement that he made in his testimony, that he had no reason to know about, and they continued to, without laying any foundation for his testimony, pound questions at him and get answers,
and on cross-examination I think it has become per-
29672 fectly clear that there was no foundation, even, for the answers that he gave, not only as to costs but as to many other things.

Mr. Withrow: If Counsel for the Commission is willing to ask him one question whether or not he knew anything of his own knowledge, or ever acted with reference to this price increase in 1933, I am pretty sure he would satisfy himself on the matter that this witness does know about it, and that he handled it, and that is his testimony, and, as I understand it, on cross. It has not even been attacked on cross.

Trial Examiner Norwood: Well, I am sure that most of this witness' testimony should not be struck.

If the Counsel will renew his motion tomorrow and give us a line and page of the testimony that he thinks should be struck, and refer to the testimony on which he bases his motion, I will give it some study.

Mr. Wooden: Your Honor, will you pardon me for this interpolation here?

That reminds me that on an occasion some weeks ago we furnished you with citations to page and line of similar testimony of the Witness Bowen representing the Lehigh Company, and accompanied it with our motion to strike for similar reasons to those stated by Mr. MacIntyre now. We
have not yet had a ruling, and I am rather concerned
29673 about getting an early ruling, if possible, not only on this witness' testimony as to costs, but also as to that of other witnesses, particularly that of Mr. Bowen. I think there are still others, such as Mr. Magee, of the Alpha Company.

The reason that I should like to have an early ruling is because we will need to know what the procedure is to be on that particular subject so that we may prepare, if necessary, for proper rebuttal, but before we reach that stage it would be my intention to seek a ruling from the Commission upon the relevancy and materiality of that subject.

Trial Examiner Norwood: Well, I remember overruling one motion like that, and my impression is that the Counsel gave me the exact data, and that when we were in New York; and my record copies were in Washington, and since that we went back to Washington and I simply haven't had time, but I will promise the Counsel that I will run that out and make the ruling, certainly during the first hearing after Christmas, so I will ask Counsel tomorrow morning to give me the data on this other one, and I will run them both out.

29674 *Redirect Examination by Mr. Withrow.*

Q. Mr. Davis, would you tell us whether or not if there were any agreements or understandings with competitors with reference to price or marketing policies, whether you would know of their existence?

A. Yes, sir; I think I would know about them.

Trial Examiner Norwood: That is, as at this time, and during what times?

The Witness: I think at any time since I have been connected with the company.

By Mr. Withrow:

Q. That is, since 1931?

A. Since 1931.

Q. Now, Mr. MacIntyre, in his statement to the Judge, referred to you turning everything over to the sales manager and not knowing anything about sales policy.

Would you tell us whether or not you know the
29675 general sales policy of the Superior Cement Corporation?

A. Yes, as to its major matters. The minor details, I don't go into at all.

Q. Now, would you tell us whether or not you could have sold any cement in July, 1933, at this price of 25 cents up if your competitors had not followed that price increase of 25 cents?

A. No, I don't think we could. We might have sold some, but—

Q. Have you ever found that you could sell your cement at a higher price than your competitors?

A. Not much.

29686 H. H. MOORE, being called as a witness for Respondents and being first duly sworn, testified as follows:

Direct Examination by Mr. Withrow.

I am associated with the Superior Cement Corporation whose general offices are at Portsmouth, Ohio. I am
29687 secretary and treasurer and have been associated with the company since July of 1924, I believe, a period of about 15 years. I have never been connected with any other cement company prior to my connection with the Superior Cement Corporation. My duties as secretary and treasurer are the usual duties that go with that
29688 position. I take care of a number of detail matters affecting the management of the company. I am located at Portsmouth, Ohio, handling the company funds, tax matters, the general office routine and items of that nature. I am familiar with the books and records of the company and to a great extent with our files.

Q. Would you tell us whether or not you are familiar with the details of the sales policy of the company?

A. No, I am not familiar with the details of the policy.

Q. Now, you have some knowledge of sales, however,—or would you tell us whether or not you do have any?

A. I no doubt have some; it would be very minor.

Q. Would you tell us whether or not, to your knowledge, the salesmen of the Superior Cement Corporation carry lists of delivered prices, or lists of price bases and freight rate books?

A. I am sure that they carry lists of delivered prices.

29701 Q. Mr. Moore, you testified that your company had announced to the trade its marketing policies. I show you Respondents' Exhibit 1855, and ask you if that is a copy of the announcement made by your company?

A. Yes, it is.

(RESP. EX. 1855 was offered and received in evidence.)

29731 Washington, D. C.,
December 21, 1939.

29762 H. H. MOORE thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Withrow.

Q. Mr. Moore, are you familiar with the fact—or would you tell us whether or not you are familiar with the fact that the Superior Cement Corporation bid on several projects at Chillicothe, Ohio?

A. Yes, I am sure that they did.

29763 The witness identified Resp. Ex. 1861 as a copy of a memorandum from T. G. Evans to Harry Shear having to do with the taking of bids. The initials on the face of Resp. Ex. 1861 are those of Mr. Con Hearn, sales manager of the company. Mr. Shear and Mr. Evans were employees of the company at the time this paper was prepared, February 1936. He has seen many memoranda such as these in the course of his business.

29764 The witness identified Resp. Ex. 1862 A to H as a Government invitation form for bidding on cement, in this particular case to the Veteran's Administration at Chillicothe. As these invitations came in to Superior they go across his desk.

The witness identified Resp. Ex. 1863 as the office file copy of a memorandum from Mr. Evans to Mr. Shear. He had occasion to see memoranda like this in the course of his business.

The witness identified Resp. Ex. 1867 as a Government invitation form for bids on cement to the Industrial

29765 Reformatory at Chillicothe. This invitation, as well as all incoming mail, goes across witness' desk in the regular course. He is certain that the handwriting on the face of Resp. Ex. 1867 A and B is that of T. C. Evans. Evans was connected with this company in June 1936.

The witness identified Resp. Ex. 1866 as a copy of a memorandum taken from his company's files. The handwriting on the face of that is T. C. Evans'.

The witness identified Resp. Ex. 1865 as a copy of a letter from his company's files to the Department of Jus-

tice at Chillicothe, Ohio, acknowledging an order
29766 Resp. Ex. 1864 A and B as another Government invitation form. T. C. Evans' handwriting appears on its face. Copies of these invitations to bid, Resp. Ex. 1862 A to H, 1867 A and B, and 1864 A and B, are filled in in the regular course of the company's business and in the same manner in which the original bids were made. Mr. Evans wrote these memoranda on these exhibits, including the price data, etc., to be typed by one of the office girls, as preparing a bid to the Government. Those documents are Superior's record of what was bid to the Government in those instances.

29771 Trial Examiner Norwood: Did you swear that that was the exact duplicate of the bid that was submitted?

The Witness: I am as sure of that as I ever was of anything; yes, sir.

Trial Examiner Norwood: Do you know whether it was filed in the due course of business as other bids are?

The Witness: May I have that question, Your Honor?

The Witness: I have every reason to believe it was.

Trial Examiner Norwood: Do you know? I say, do you know? Tell us what you know about it.

29772 The Witness: I know that that came from the files of our company, and that it is similar to many that I have seen prepared by this man Evans to be given in that form to his stenographer.

Trial Examiner Norwood: Is his signature on there?

Mr. Withrow: It is his handwriting, Your Honor. He identified the handwriting.

Trial Examiner Norwood: You identified that handwriting, did you?

The Witness: Yes, sir.

29775 Trial Examiner Norwood: I think that if you are going to put this in, that you should put it in with some testimony from somebody who knows about it, and if you do that, you certainly have a right to put it in.

Mr. Withrow: He says it is the policy of the company to handle it in the manner in which these were handled, to be filled in, have them typed up, and then kept as a
29776 file copy, those documents, a file copy of what they do. That is the only copy, the only document they have, and that is the course of filling in many bids, and this witness knows about it.

Trial Examiner Norwood: That situation could exist and still this might be an erroneous bid they made out and did not send, and there may be some other correct copies somewhere else in the file.

29777 By Mr. Withrow:

Q. Would you tell us, Mr. Moore, whether or not those are the office copies of the bids?

29778 A. Yes, sir; they are.

Mr. Withrow: I submit that on that showing, Your Honor, and on the further fact that Counsel for the Respondents have repeatedly requested, on a number of occasions, that the United States Government, in whose possession the original bids rest, produce the bids, and that request having been refused, that those documents should be received.

Trial Examiner Norwood: What is the matter with you getting the original and comparing it?

Mr. Paulson: Your Honor, I asked this man if in the course of his official duties he saw that copy after it was made out, and he said no. He has no way of knowing that is the office copy. That is as far as we need to go. That one question is sufficient. He had not seen the bid after it was filled out, so he cannot know. That forecloses any further testimony.

Mr. Leisure: Your Honor pleases, one thing I would like to call Your Honor's attention to at this time,—these tabulations were offered and received in evidence more or less on agreement. Now, we asked repeatedly that the original of this bid be presented here. It has not been presented. When we present the office copy they

29779 want the office boy and the stenographer, and every one who did that sort of thing.

Mr. MacIntyre (Interposing): No.

Mr. Leisure: I think they either ought to produce the original themselves—

Trial Examiner Norwood: Yes.

Mr. Leisure: —or withdrawn these objections to these office copies going in.

29781 Mr. MacIntyre: It simply shows they are attempting to put in facts—that purport to be shown by some papers that were not on bids as submitted, and putting them in through a man that cannot testify to them. That is very clear.

Now, as to the copy of the bid that was actually sub-

mitted, if the man can testify that it is a copy, we have no objection to that; but, we do have an objection
29782 to them bringing in a mass of papers here that they are offering to show something that the man cannot testify about, and doesn't know whether they show it.

Trial Examiner Norwood: Now that Counsel have had complete discussion, if they will answer my questions from this on I think we will proceed to a fair understanding much more rapidly.

You object to these other invitations here that were sent out by the Government?

Mr. Paulson: Yes, Your Honor.

Trial Examiner Norwood: And you object to those on account of the pencil memoranda here?

Mr. Paulson: Your Honor, we object to them because they have not been authenticated.

29783 Trial Examiner Norwood: Yes.

Now, as to these pencil memoranda that were added by a third party—

Mr. Withrow: And were identified, the handwriting.

Trial Examiner Norwood: —and were identified in his handwriting, I cannot see that they are competent in any way, because this is something that is merely in the files there, and was not forwarded, and is not part of a bid that was forwarded, and it is not shown here that it was acted on in any way or manner whatsoever.

29784 Trial Examiner Norwood: Yes. Well, is this a copy of a bid about which evidence has been adduced (indicating)?

Mr. Withrow: No. This bid, Your Honor, is under date of February 20, 1936,—Prior to that bid, showing that this company bid the same figure which it bid on a subsequent date, and explains how it got that figure; it shows the independent action of that company, that that was its price.

Trial Examiner Norwood: This is not a completion, then, of evidence that is already in as to a particular bid; is that right?

Mr. Withrow: It completes the surrounding facts.

Mr. Paulson: That is our understanding.

Mr. Withrow: It is our contention it is material and relevant, because it does so.

Trial Examiner Norwood: Why do you want this
29785 invitation here, Respondents' Exhibit 1867-A? What do you want to establish by that?

Mr. Withrow: We have been trying to get the original bid. We have been unable to do so. This is the best evidence we can secure as to what was bid by this company. It is the file copy, and we think it is material and relevant to show what this company bid.

Trial Examiner Norwood: In other words, you are submitting it for this pencil memorandum?

Mr. Withrow: Absolutely; that is the reason I had it identified.

Trial Examiner Norwood: That is the only part I think inadmissible. I think it would be if it ties up with the other bid that we have received evidence concerning.

I think I shall overrule the objection to the entire batch—

Mr. Paulson: Overrule the objection?

Trial Examiner Norwood: I mean I shall sustain the objection to the entire batch, Respondents' Exhibits 1861 through 1867. The objection is sustained. Counsel have their exceptions.

I thought that the bid, all the time, was the bid which covered one of the items on one of the abstracts there.

29786 Mr. MacIntyre: Well, if they bring in such a bid, Your Honor, here, a copy of it, that is shown by the record to be such a bid, we do not object to it.

Trial Examiner Norwood: Well, I understand.

Mr. Withrow: Your Honor, I offer to prove through this chain of exhibits, Respondents' Exhibits 1861, to 1867, inclusive, that this Respondent had on occasions prior to its bid of June 12, 1936, to the United States Industrial Reformatory at Chillicothe, Ohio, bid a price of $2.02 for cement at that destination, and had received orders for cement at that price on two occasions. And, I further offer to prove through these documents, that this company bid on June 12, 1936, in accordance with Respondents' Exhibit 1867-A and B, a price to the U. S. Industrial Reformatory, qualified as contained on that exhibit, and that as a result of more advantageous terms and conditions of sale, was awarded the contract on that invitation, and the Respondents' Exhibit 1865 showing that they were requested to ship the cement by the Department of Justice, it appearing from the exhibits already offered on behalf of some of the other Respondents that the terms, as evidenced by these papers of this company, in connection with this bid, were more favorable.

Trial Examiner Norwood: All of that is concerning bids that are not in evidence.

29787 Mr. Withrow: No, sir. All of that is in. The one that had more favorable terms than I was commenting on, Your Honor, is the one that is in evidence, the one we are directing our attention to, the one we are showing this gentleman, the previous bids at a price, and with this gentleman, as a successful bidder.

Trial Examiner Norwood: Which one is that?

Mr. Withrow: Well, 1867-A, B, Your Honor, with the handwriting on, is the final bid.

Trial Examiner Norwood: That is the only one of these documents that referred to a bid that is in evidence, is it?

Mr. Withrow: Well, it is the only bid on which a tabulation is in evidence, but our contention is that these previous bids to the same purchaser had the same destination, are part of the facts.

Trial Examiner Norwood: And the only testimony on this document, that shows what they bid, is this pencil memorandum here.

Mr. Withrow: Yes. It is the office copy, and it was the normal routine of the office to prepare in that manner, as their only copy of what they bid.

Trial Examiner Norwood: Well, this does not appear to be a bid. It does not even purport to be copy of a bid. This is an invitation to bid, an acceptance.

29788 I see.

Mr. Withrow: It is a short form bid, Your Honor, invitation and bid on one.

Trial Examiner Norwood: I see.

Now, can this witness swear that this was the amount bid?

Mr. MacIntyre: That is what I was attempting to have attention drawn to.

Trial Examiner Norwood: Can you testify that your company bid on June 12, 1936,— the Department of Justice, Chillicothe, Ohio, on 500 barrels,—can you tell us what the figure was they bid on that?

The Witness: No, sir; I could not tell you that.

Trial Examiner Norwood: You cannot tell that.

You see, you are putting that in on the authority of a third party.

Mr. Withrow: This gentleman did testify, though, that this was the policy of the company, the practice of the com-

pany,—had been at that time,—for Mr. Evans to write these out in longhand, to submit them to a stenographer to have an original typed, the original of which was then sent to the bidding officer, and that this was the copy that they kept in their file as their file copy.

Mr. MacIntyre: Now, if this witness can vouch
29789 for Exhibit 1867 as being a true and correct copy of the bid that this company submitted on that invitation, we will withdraw objections to it.

Trial Examiner Norwood: Well, evidently he cannot do that. He said he could not.

Mr. Withrow: He has not said he could not. He has not been asked the question.

By Mr. Withrow:

Q. Mr. Moore, do you have any reason to believe that that is not an accurate copy of what was bid by your company?

A. I have no reason to believe that.

Trial Examiner Norwood: That would not be sufficient.

The Witness: I have no reason whatever to believe that.

29790 By Mr. Paulson:

Q. When did you first see that paper, Mr. Moore?

A. I may have seen that particular paper many times.

Q. I say, when did you first see it?

A. I do not believe I could answer the question as to when I first saw it.

Q. When Counsel showed it to you, is that the first time?

Trial Examiner Norwood: I do not believe it has been sufficiently identified. I shall reject the entire proffer.

Counsel has his exceptions.

29791 The witness identified Resp. Ex. 1868 as a carbon copy of a letter written by Superior's sales
29792 manager Mr. Con Hearn to the Division of Purchase and Public Property, Frankfort, Ky. This copy was originally sent to Superior's salesman George Ellinson. The handwriting on the face of the letter is that of George Ellinson. The receipt stamp was put on the letter on July 27, 1939, this copy having been returned to the general office by Mr. Ellinson. It would have passed over the witness' desk.

The witness identified Resp. Ex. 1869-A, B as a paper that would have passed over his desk.

Mr. Paulson: I do not think we ought to spend time on these, Your Honor. I do not think they ought to be allowed to take up your time and the time of the Commission in offering these papers through this witness. It has been established now he has no connection with the sales department at all. These two documents, 1868 and 1869-A and B, are documents signed by the sales manager; one is signed by the sales manager, Exhibit
29793 1868, and the other is the invitation by the State of Kentucky. To my knowledge, there is nothing in the record by way of a tabulation about the State of Kentucky bids, to which this might refer, for an additional reason; but this witness can't identify these, and he is not the proper man. What is in issue in regard to this subject of bidding is the method of bidding, did they conspire in connection with the bidding, and how did they make up their bids, and so on.

Trial Examiner Norwood: Well, state your legal grounds.

Mr. Paulson: These are absolutely of no help to us on that. I consider that to be a legal ground. This is in the nature of a fair hearing. You have said from time to time, and have ruled that way, and these are legally inadmissible, and it is also improper on the basis of your rules which Your Honor has followed here.

29794 Mr. MacIntyre: We object on the ground that the writings of a head of the department who is not called, is hearsay.

Mr. Leisure: If that is the ground, then we press our offer on the ground that this witness has said that they emanated from his company and passed over his desk, and I do not think there is any further argument required.

Trial Examiner Norwood: Do they have to do with some bid that is in evidence already?

Mr. MacIntyre: We do not consider that they do.

29795 Mr. Withrow: No, Your Honor.

Trial Examiner Norwood: No.

Mr. Withrow: But they have a general bearing on a lot of issues and matters raised by the complaint.

Mr. MacIntyre: To which the man has not testified.

Mr. Paulson: I wish it understood the Commission has an objection on the record that they are not properly identified.

Trial Examiner Norwood: Now, while Counsel are

discussing that, I want to go back to this Exhibit 1861-1867. I was just a little bit confused by the much discussion there, but I want again to examine that bid that relates to the bid reported on the tabulation. As to these documents here that do not relate to something already in evidence the objection is sustained.

29796 Mr. MacIntyre: Where would you suggest we get Exhibit 1865, which is a memorandum between two salesmen in this company? We cannot check that. It is hearsay. We object to it on that ground. As to the bid, we do not offer the same objection.

29797 Mr. Paulson: It is quite a serious point or we would not be quibbling about identification. I will tell you why it is serious, in our opinion: They have attempted to build up a defense around this company, and by this means they have attempted to show it does not use the freight rate basing point, that it uses the delivered prices, publishes a list of delivered prices, and they introduce a long line of documentary evidence, so we must insist on them calling the man who made the bids and explaining how the sales are conducted, that the papers be properly identified. It is not that we want to be technical, but they are not identified, and so we have to insist on the rules this time. We would not do it otherwise.

Trial Examiner Norwood: It has been identified as an office copy, and the facts are within your possession. You can easily disprove that if that is wrong.

Mr. Paulson: This man did not see the copy made. He did not see the bid as it went out, did not see it, did not know when he saw this copy before.

Trial Examiner Norwood: Exhibits 1868 and 1869 are rejected—that is, the objection is sustained; and

29798 as to Exhibit 1867-A, it is received.

Trial Examiner Norwood: Respondents' Exhibit 1867-A and B is received.

(RESP. EX. 1867-A and 1867-B was offered and received in evidence.)

Trial Examiner Norwood: On the record.

Respondents' Exhibits 1861 to 1866, inclusive, are rejected, and Respondents' Exhibit 1867-A, B, is received.

29812-13 The witness identified Resp. Ex. 1894 as a Superior, office communication. The handwriting of J. C. Davis appears on the document. He was a salesman

in central Ohio at the time this report was written. The document passed over the witness' desk, and comes from the files of Superior. He further identified Resp. Ex. 1896 as another interoffice memo of the company from J. C. Davis, salesman, to the sales department. That is in Mr. Davis' handwriting, and is from the files of Superior. He further identified Resp. Exs. 1895 and 1897 through
29814 1903 as interoffice communications of his company which came from his files; Resp. Ex. 1904 as a letter he received; he remembers distinctly that this letter passed over his desk; Resp. Ex. 1905 as a letter received by Mr. Watson of his company. The handwriting of
29815 A. C. Watson appears down in the lower right hand corner. He further identified Resp. Ex. 1906 as a letter, dated August 6, 1935, from a contractor asking for a quotation of cement to various points. That request undoubtedly went over his desk, and is from his files. He further identified Resp. Ex. 1907 as a carbon copy of a quotation made by Superior Cement Corporation, on August 6, 1935, to a contractor at St. Paul, Minnesota; Resp. Ex. 1900 as another carbon copy of a quotation made August 21, 1935 by Superior Cement Corporation. These
29816 two copies, Resp. Ex. 1907 and 1908, come from his files. He further identified Resp. Ex. 1909 to 1918 as letters sent by Superior Cement Corporation to a contractor at Portsmouth, Ohio, requesting a lower price on cement, and these, Resp. Exs. 1409-1918, inclusive, came from the files of his company.

29818 *Examination On Voir Dire by Mr. Paulson:*

29819 Q. Mr. Moore, how do you know these documents came from the files?

A. I have seen many of those documents in our office.

Q. I said, how do you know they came from the file?

A. I know that they have been in our files.

Q. How do you know that they have been in your files?

A. Because, as a matter of fact, under my direction Mr. Shaw removed many of those from the files after—

Q. Did you see him do that?

A. By actual sight?

Q. Yes.

A. No, sir.

Q. You say you recognize these documents from having seen them before; is that right?

A. Yes, I have seen those documents before.

Q. Do you recognize every document that you saw come across your desk? Would you recognize every one? If I should show you another document that I know came from across your desk do you think you would know it came from across your desk?

Mr. Withrow: Your Honor, I object to that.

If he wants to test the recollection of the witness by showing him the specific document, we would have no objection. I do not think this is a proper voir dire examination. It is cross-examination, perhaps, if it is anything.

29820 Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: The objection is overruled.

Mr. Withrow: There are four questions there, too, Your Honor.

Trial Examiner Norwood: Yes, he may answer them all.

Mr. Paulson: He can answer them one at a time.

Trial Examiner Norwood: Can you answer that question?

A. During the number of years I have been with the company there have been thousands of documents come across my desk. It is entirely possible that I could not recognize some of them; I—

By Mr. Paulson:

Q. Did you read these documents when they came across your desk in the first instance, if they did—did you read them?

A. I probably did, yes.

Q. Well, did you?

A. I have no way of knowing today whether I read every individual document.

Q. Then, how do you recognize those as having come across your desk?

A. I am referring now to the time they came across my desk, the first time; they have been on my desk since then.

Q. I know, so am I referring to when they came

29821 across your desk the first time. You say you did not read them when they came across your desk. Now,

I ask you how you recognize them as having come across your desk?

A. All incoming mail to the company comes across my desk.

Q. Oh, and because all incoming mail to the company comes across your desk, you assume that these came across your desk; is that right?

A. I don't know that it is an assumption; I believe the evidence is that.

Q. You have no independent knowledge that they did?

A. No, not as to each individual piece of paper; no, sir.

Q. And you have no independent knowledge that these came from your files, now, to this hearing room?

A. Yes, I am sure that they came from my files.

Q. You saw them taken from the files?

A. I didn't see the men take each individual paper out of the file cabinet; no, sir.

Q. It is very possible that there are several papers here that did not come from your file, isn't that so?

A. No, I would say, I don't believe so; I believe that they did.

Q. Did you prepare any of these papers?

A. Did I?

Q. Yes.

A. No, I didn't prepare them.

29822 Q. Did you make the deals that are involved and to which the papers refer?

A. No, I did not.

Q. Can you testify that the statements made by representatives of your company herein are true and accurate?

Mr. Withrow: Your Honor, I object to that question. I think that we have gone pretty far afield from voir dire examination. It is cross-examination of this witness. He has identified these documents as coming from his files, and matters that he knows are the company's papers, and, in some instances, they went across his desk.

That is sufficient identification.

Trial Examiner Norwood: Now, I should like to know a little more about these.

The objection is overruled.

Answer the question.

The Witness: May I have the question?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. No, I could not testify to that.

By Mr. Paulson:

Q. Of course, you can't testify to the truth and accuracy of the statements made by those third parties; namely, the contractors that signed some of these letters, can you?

29823 A. I might be able to if I see the letters.

Q. That is, you think you could testify to the truth and accuracy of a statement made by a contractor writing to your company?

A. That depends on what he is writing about.

Mr. Paulson: Your Honor, I have some belief that Respondents' Counsel are pressing this, trying to put us in a sort of a position here that might be embarrassing inasmuch as they are offering documents with no further identification than that they came from the files of the company, and they, of course, maintain that that was not proper identification when we offered the papers; but I do not recall that any of our identification stopped there, and that, or it was only on admissions, and where a different rule might apply. Identification or authentication for admissions, where admission is involved, is a different rule from the one where the witnesses are available to the company, or checking is easier, and so otherwise I can't understand how Counsel would be doing this. They must full well know that this man cannot identify papers, and the voir dire has developed that he cannot identify these papers. It has developed his only contact with them is when they passed over his desk to the company, and he did not read them when they passed over his desk. He is not sure, he can't swear under oath that these are the papers
29824 that he saw come over his desk. It is his belief that they came over his desk because everything passes over his desk.

I think Counsel are just having some fun with us.

Trial Examiner Norwood: Did you take any action resulting from your receipt of those papers?

The Witness: May I run through them just a moment?

Trial Examiner Norwood: I mean, are they addressed to you about matters about which you took action, any of these papers?

The Witness: May I run through them hurriedly a moment?

Trial Examiner Norwood: Yes.

Mr. Leisure: Your Honor please, in reply to Mr. Paul-

son I would like to say that we have had no ulterior motive in offering these. We did not even have in mind the fact that similar exhibits had been offered by the Commission. We did not compare these with the exhibits that have been offered by the Commission in any way. We had this in mind, and this in mind only, we have had the president of the company on the stand. We also called the secretary and treasurer of the company. We have believed and still believe that when he is able to sufficiently identify the documents as being documents written and received by his company on matters that are material and relevant
29825 to this case, that the documents are admissible in evidence, and the only reason that we have not called 15 witnesses and had them here this morning and today to identify piecemeal these exhibits, is that we did not think it would be necessary, and we still do not think it should be necessary. We do think the documents are relevant and material to the issues in this case, and we think when we call the two chief executives of the company to identify correspondence of this kind that that should be sufficient.

Now, those are our motives.

Trial Examiner Norwood: Do any of these documents pertain to documents that are already in evidence?

Mr. Leisure: "Yes" and "no," some do and some do not; but whether they do or not, if the documents explain our position as to action that we have taken, as I think clearly the last group does, and will appear to do before we finish with the testimony in this group, I think then they are part of the documentary evidence in this case which should be received. If there is any objection at all that has any legal merit it is as to identification. Now, I do not think that that is a very weighty objection because here is the treasurer and secretary of the company who vouches for them coming from his files, and for them having been written and received in the regular course of business.

29826 Mr. MacIntyre: Your Honor please, the most serious objection that we raise here at this time is just this: Here is a batch of papers that purports to contain factual statements written by parties not presented as witnesses, some of them not even connected with the company with which this witness is connected. The witness has stated that he cannot vouch and swear as to the accuracy and truth of the statements contained therein. Now, on

the offer of proof that is made, they are being offered for the statements contained therein, and if we are to receive such documents as that it would be the rankest sort of hearsay.

As to a further point raised by Mr. Leisure, he talked about 15 or 20 different parties; that is, parties to this correspondence. It so happens that Mr. Con Hearn, the sales manager of this company, is a party to almost all of these documents, and almost all that they have offered heretofore. He could just as well have called Mr. Hearn, therefore, a single witness, who was a party to practically all of them. Instead, however, of doing that he has called a party that was not a party to any of them. This witness is not connected to any of them, so now alleging hardship of calling all the witnesses he has gone away around the corner and called somebody who is not a party to
29827 any of them, whereas one man is a party to 90 per cent of them. This does not hold water.

Mr. Leisure: Now, Mr. MacIntyre, as usual, has inaccurately stated the record. Now, to test him on that, will he withdraw his objection—he said Mr. Hearn is a party to all of these. Will he withdraw his objection to all these exhibits we are now offering to which Mr. Hearn was not a party?

Mr. MacIntyre: No, no. I stated Mr. Hearn was not a party to all of them.

Mr. Withrow: Here is a whole hand full of them Mr. Hearn is not mentioned in, was not a party to.

Mr. Leisure: Not even a party to a small portion.

Mr. Withrow: So all this is is an attempt by Counsel for the Commission to dictate who we shall call as witnesses. We can call only one man at a time, and if we are to call every man involved, it means calling fifteen or twenty.

Mr. MacIntyre: His Honor has asked this witness a question, and if will clear up the point I have in mind. He asked the witness to which of these papers was the witness a party. Let us get the witness' answer.

Trial Examiner Norwood: Did you pick out any?

The Witness: May I have the question as you asked it, Your Honor?

Trial Examiner Norwood: I gave you the papers
29828 to look over.

Mr. Withrow: Mr. Paulson took them.

Mr. MacIntyre: The witness had completed his examination of them.

Mr. Withrow: Let the witness speak as to whether he completed his examination.

Mr. MacIntyre: Let him tell us which ones he is a party to.

Trial Examiner Norwood: I think that is rather a vain thing, because from this witness' testimony he could not have taken any action on any of those things which would be important or would bear on the issues of this case. In other words, they would not be relevant even then, no matter what he did, and the mere fact that he received them and acted on them would not make them admissible now, and I do not see any reason whatsoever for receiving them.

Mr. Withrow: Well, Your Honor, these letters are the best evidence of how this company acted with reference to certain transactions, to-wit, they are the actual transactions. Now, the letters from third parties to which Mr. MacIntyre very eloquently objected are letters on which the Respondent acted, and the letters, acting on them, are in the offer, and they are only offered to show the documents on which the company acted. They are not
29829 offered to show the truth of the contents.

Trial Examiner Norwood: We have never received anything like that unless a responsible officer of the company, or the one—

Mr. Withrow: We have received thousands of them.

Trial Examiner Norwood: Who took the action, and that action was a relevant action, was on the stand, and gave us the circumstances and facts and could be cross-examined about it.

Mr. MacIntyre: Or unless they were received as admissions against the company concerning action taken by it.

Trial Examiner Norwood: That is an entirely different matter.

Mr. Withrow: Well, they have received thousands in this case, Your Honor. I can recall 8,000 at one time.

Trial Examiner Norwood: I think we are wasting time on these papers, I really do.

I shall sustain the objection. Exhibits 1894 to 1962, inclusive, not received.

Mr. MacIntyre: They only offered 1894 to 1918.

Mr. Withrow: Your Honor, without going through the

rest of these documents, I won't go to the trouble of having the testimony, if Your Honor will rule similarly with respect to Respondents' Exhibits 1919 through 1962.

Trial Examiner Norwood: Yes, if they are of a
29830 similar nature I shall reject them, too, and give you your exception on all of them.

Mr. Withrow: May I have those papers, Mr. Paulson?

(Mr. Paulson hands papers to Mr. Withrow.)

Trial Examiner Norwood: And I will ask Counsel not to have any more papers like that marked.

Mr. Withrow: Your Honor, I would like at this time to make an offer of proof to the effect that this Respondent received and acted upon letters from its customers showing the company maintained its good will with the customers, that it does not answer complaints from—

Trial Examiner Norwood: Now, you can't in good faith make that offer here.

Mr. Withrow: These documents so show, Your Honor.

Trial Examiner Norwood: This man can't say he received and acted upon these.

Mr. Withrow: But these letters are the acts of this company, Your Honor.

Trial Examiner Norwood: You are offering something which you do not have; that is not a bona fide offer of proof.

Mr. Withrow: These documents show—

Mr. Paulson: He offers the conclusions; not the facts.

Mr. Withrow: These documents show how this
29831 company acted, Your Honor.

Trial Examiner Norwood: I understand that.

Mr. Withrow: I am merely saying these documents, if received in evidence, would show that this company acted in such and such manner.

Trial Examiner Norwood: You are offering a number of documents which would tend to show so and so and so. Go ahead.

Mr. Withrow: That is right. That is what I stated, I believe.

Trial Examiner Norwood: Go ahead.

Mr. Withrow: I am offering a number of documents, starting with Exhibit 1902, which would tend to show that this company acted to comply with requests by dealers with reference to the subject of diversions in transit, that it did not answer complaints by dealers' associations, that

as the result of bidding on the Tygart River Reservoir Dam at a price below their market price they were requested and in fact complied with the request by contractors to give lower prices on contract jobs; and in Respondents'—starting with Exhibit No. 1894 through 1901, that this company has sold direct and bid direct to the W.P.A., and that it received reports from its salesmen of the existence of price concessions in the field made by its competitors, and that Exhibits 1919 through 1962-
29832 are a series of reports from salesmen reporting conditions of the trade with reference to the existence of special prices, and the qualifications this company requires of the dealer, and investigation of the dealer's ability to serve the community where it is located, and investigation of its credit standing, and, further that this company received from both dealers and contractors requests for delivered prices from its customers, and will further show the action which this company took on such matters.

Mr. Paulson: It should appear in the record that a large number of these exhibits that have been offered and rejected are written and received subject to the issuance of this complaint. I noticed a great many through there that were 1938 and 1939. I do not know how many. The period of time was not specified in Counsel's offer of proof. I just think it should be noted.

Trial Examiner Norwood: I do not consider that the documents which he has offered are properly identified here and properly offered to prove those points. He may prove them by competent evidence. No change in the ruling.

Mr. Withrow: Your Honor, I take it that you do not want me to take the time to have this witness to identify the handwriting appearing on this document, if no point is made of that fact—
29833 Trial Examiner Norwood: No.

29837 Washington, D. C.,
January 9, 1940.

29850 Trial Examiner Norwood: Well, if you are going to make a stipulation of facts, I think you should make it before we examine any more witnesses.

Mr. Leisure: Well, the stipulation of facts is something we would have to get together and agree on. I have not attempted to set down specific facts that we could agree on. That is something that will have to be worked out together. But if we can agree on some method here, I think we will have no difficulties. As the Examiner has pointed out, there are certain things here which, it seems to me, both sides would necessarily agree to.

Trial Examiner Norwood: Yes.

Mr. Wooden: On evidentiary matters, yes, that is the point of a lot of our objections; they were just proving and re-proving the same thing over and over again that we had proved.

Trial Examiner Norwood: If you will enter into a stipulation with him—

Mr. Wooden: I offered to many times on the rec-
29851 ord about this matter, about those evidentiary matters, and it was always declined.

Mr. Leisure: Well, I do not agree with that. I do not think it was acceptable. As to stipulations that were equally fair to both sides I think we have been as willing as Mr. Wooden at all times, and I am sure of that.

Mr. Wooden: Many times I offered to stipulate what the proof would be and what the testimony would be and freely withdrew any objection if it was going to be different from what had already been proved, and we went on and proved the same thing nevertheless.

Your Honor, since Mr. Leisure has referred to this proposed stipulation and his rejection of it partly on the ground that to accept it would constitute some kind of an interference with due process of law, I submit a copy of the stipulation and the correspondence regarding it, and ask that it be spread on the record.

Mr. Leisure: Now, I think that my statement did not refer to the stipulation. I said that unless we were able to proceed and unless this evidence were handled in certain ways—I think my statement is clear on that.

Trial Examiner Norwood: I do not see any use of that going on the record.

Mr. Leisure: I will offer them both if one is going
29852 to go in; I will offer ours.

Trial Examiner Norwood: You may mark them as exhibits.

Mr. Wooden: Well, I will be glad to have that done at least.

Mr. MacIntyre: That is especially true, Your Honor, since Mr. Leisure has already had a statement placed on the face of the record describing this proposed stipulation and claiming what it would do for him, and the denial of certain of his rights. I think the record ought to be replete with what its significance is even if it is merely marking it for identification.

Trial Examiner Norwood: Well, wouldn't it serve the same purpose? The Counsel has a good point there.

Mr. Leisure: I think the record is clear as to what I referred to as to the denial of rights.

Trial Examiner Norwood: There is nothing on the record yet.

Mr. Leisure: As to what I said—I mean, Mr. MacIntyre has attempted to tell the Examiner what I said a few moments ago. I prefer the record as it is rather than Mr. MacIntyre's statement.

Trial Examiner Norwood: No, I think Counsel has a right to do that, as his statement has gone on the record
and here is the proposed stipulation itself. That is
29853 as yet no part of the record. I think it would serve all purposes to mark it merely for identification.

Mr. Leisure: Then, we would like ours marked also, if we may.

Trial Examiner Norwood: What is it?

Mr. Leisure: You have just marked Commission's proposed stipulation. I am asking that our proposed stipulation also be marked.

Trial Examiner Norwood: Yes. You are proposing one now. We will mark the Commission's proposed stipulation.

Mr. Wooden: And the two letters.

Trial Examiner Norwood: We will mark the Commission's proposed stipulation 3239.

Mr. Leisure: We haven't referred to any letters. I see no reason for marking them.

Trial Examiner Norwood: Oh, that contains the proposal.

Mr. Brick: Mr. Wooden did not make any reference to any correspondence. Is he including correspondence with the stipulation?

Trial Examiner Norwood: Yes, sir.

(The stipulation referred to was marked for identification "Commission's Exhibit 3239-A to 3239-F," inclusive.)

Trial Examiner Norwood: Off the record.

29854 (There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Now, mark Respondents' proposed stipulation 1963-A to H.

(The stipulation referred to was marked for identification "Respondents' Exhibit 1963-A to 1963-H," inclusive.)

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

I do not think I will receive these as part of the record. I think when they are marked for identification that is sufficient.

Mr. Paulson: May we go off the record a minute, please?

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. A. T. Wood is recalled by the Respondents.

Proceed with the examination.

A. T. WOOD was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Paulson.

29855 Q. Mr. Wood, how many salesmen did you say you had?

A. Five.

Q. Do you supply your salesmen with automobiles?

A. Some of them.

Q. How much cement per month does a salesman sell, as a rule?

A. Well, that varies.

Q. Well, give me an approximation.

A. Well, the West Virginia salesmen will sell more than the salesmen in Ohio or Kentucky.

Q. Well, do you hold to any normal amount?

A. No, sir.

Q. Do you have any standard or norml by which you judge their record?

A. No, sir.

Q. If they sell fifty barrels would that be enough?

A. Well, that is less than a carload.

Q. Well, if they sold a carload, would that be enough?

A. No, we would eventually get after them.

Q. Two carloads?

29856 A. Oh, I would not say that.

Q. Thirty carloads, would that be a good record for a month?

A. The average in a month will run anywheres from a thousand to—on up to four or five thousand, six thousand, depending on the season of the year.

Q. What? Carloads per month, do you mean?

A. That is barrels, thousand barrels.

Q. Barrels?

A. Yes.

Q. What is the average salary of a salesman?

A. It will run around $200 a month.

Q. Do you pay them commissions and bonuses?

A. No, sir.

Q. Do you give them mileage?

A. They have the car; we pay the expenses.

Q. You said you were general manager.

A. Yes, sir.

Q. Have you ever had any intimate contact or experience with the freight department of your company?

A. No, sir.

Q. The freight work?

A. No, sir.

Q. Do you know the procedure that is followed in billing shipments?

29857 A. Yes, sir.

Q. Well, am I correct in my understanding of your method of billing, if I say that you have your billing clerk write out an invoice in connection with each shipment?

A. Yes, sir.

Q. And on that invoice he puts the—well, you tell me what he puts on.

A. He puts the number of barrels at so much a barrel, destination price; the present time that is all that goes on.

Q. Doesn't any freight rate go on it?

A. No, sir; not on the invoice.

Q. Well, you send that invoice to the consignee, don't you?

A. The dealer, yes.

Q. And I suppose you have to make out a bill-of-lading or something to get that—

A. Yes, sir.

Q. And what goes on the bill-of-lading?

A. The name who it is shipped to, destination, routing, number of barrels, weight, and the rate.

Q. Where do you get the routing information?

A. Usually the customer will tell you how he
29858 wants it routed.

Q. In the event he does not tell you where do you get it?

A. The best way.

Q. Where? What is the best way?

A. The shortest way.

Q. I say, where do you find out what is the shortest way? How do you get that information?

A. Well, if a man was living in Charleston there is really only one way of getting there, that is over the C. & O., that is the short way.

Q. Suppose he is in Pittsburgh.

A. B. & O. would be the short way.

Q. Well, how do you know? Where do you get that information?

A. Well, it is just common sense it is the shortest way by travel.

Trial Examiner Norwood: Now, you have not answered his question. He asked you where you got that information.

The Witness: Why we ship the B. & O., is that it?

Trial Examiner Norwood: No. Where do you get your routing information?

The Witness: When it is not given to us?

Trial Examiner Norwood: When you do not happen to know the particular route, where do you get the in-
29859 formation?

The Witness: We have to look up in the railroad guides and find out the place and what railroads were there, and then pick out the shortest route.

By Mr. Paulson:

Q. Where do you get the freight rate that you put this bill-of-lading?

A. We have checked freight rates so much that we ha a little list, and from our start with the railroads we ha to ask them for freight rates, and we have narrowed tho down and we use those. The railroads which we bill throug which were three, have instructions that if the rate whi we insert on the bill-of-lading is not the rate, it has to investigated as to the correct rate before the car leav and when we do that the corrected rate is noted, so th if the shipment comes up again we have the same rate.

Q. The shipping agent for the railroad at your end the line checks the bill-of-lading to see that it carries t correct rate?

A. Absolutely.

Q. And when the shipment reaches the other end of t line the agent at the other end of the line checks it agai

A. I could not say that; I do not know.

Q. Well, you do not pay freight on a bill-of-lading, you? There is another document made out befo
29860 you pay freight, isn't that right? In other word you pay freight on a freight bill.

A. When the bill-of-lading is made out if we want prepay the freight, which we are doing now; we ma "prepay."

Q. But I mean in the case of a shipment which goes a collect basis, the customer does not take the bill-of-ladi into the railroad office and pay the freight on that.

A. No.

Q. But, instead, the railroad agent at the other end the line makes out a freight bill.

A. Correct.

Q. And sends that to the customer?

A. Right.

Q. And in putting the freight on the freight bill goes to the tariffs, doesn't he?

A. I imagine he does.

Q. In other words, there is a possibility that the freig bill might be different from the rate in the bill-of-ladi in other words, the total on the freight bill may be diffe ent; there may be a different rate from the total on t bill-of-lading.

A. Now, the total price on the bill-of-lading is not o it is only the rate per hundred.

Q. Yes, of course, but rates and totals are intimately related, directly related, and if the freight agent, the
29861 railroad agent at the end of the line, the point where the shipment is going, ascertained that a different rate applied from the rate that was carried in the bill-of-lading, why, he would make out a freight bill with the correct rate on that, and that correct rate would be the one paid by the buyer—would be different from the one designated in the bill-of-lading; you have had that experience, have you not?

A. No.

Q. And are you sure that your company has not had that experience?

A. Not since I have been there.

Q. That is, you think there is no instance in which the freight rate on the bill-of-lading has been incorrect?

A. I do not recall of any.

Q. You do not know of any but you really are not prepared to state, are you, that such a situation has not happened?

A. It may have happened, but I question it.

Q. But it could very conceivably happen, couldn't it?

A When those things happen, if they do, I would catch it just about the first time the bill-of-lading came in; that is, the auditor would, and he would say, "Here is what has happened, here is freight that they say is higher than the rate on the bill-of-lading," and then there is a fight on or would be a fight on between the railroads and ourselves for allowing that car to go, and it is just a question—I
29862 do not recall of anything like that happening at any time. We are so particular about the starting of that thing that there is not much chance of anything getting by. I do not recall of any.

Q. Yes, I imagine it would be very rare. However, I asked if, to your knowledge, the railroad agents at both ends of the line did not figure the rate, and I think you said yes; is that your recollection?

A. I believe they do.

Q. And so it is possible that they would both come to a different conclusion; in other words, arrive at a different rate; isn't that true?

A. I don't know.

Q. Well, if two men figure freight rates, they could get different conclusions, couldn't they?

A. Well, with the same rate I don't see how they could.

Q. If they correct the figure they can; but if they do not correct the figure they can't.

The method of selling employed by you, as I understood you on direct, was to let your consignee, your customer, pay the freight bill and send in a receipted freight bill as par payment of the total invoice amount; is that right?

A. That is what it used to be, yes, sir.

Q. Is it different now?

A. Yes, sir.

Q. What is it now?

29863 A. All shipments are prepaid.

Q. Since when?

A. January 2d.

Q. Of 1940?

A. Yes, 1940.

Q. Why did you change?

A. Meet competition.

Q. Are your competitors doing that?

A. Yes, sir.

Q. All of them?

A. So far as I know.

Q. They are all prepaying freight?

A. Yes, sir.

Q. Is that the first time you have experienced that?

A. No.

Q. In a general way, I mean.

A. Yes, in a general way.

Q. Yes.

A. We prepay certain payments, non-freight agents, close agents.

Q. Now, going back to what was the situation then: Did I describe it correctly, as to what you did formerly?

A. Yes, sir.

Q. Well, now, that freight bill that the railroad

29864 made out, and which eventually becomes receipted by them, by payment by your customer, what do you do with it when you get that?

A. I don't know where they are filed. That is past history. I couldn't say. The auditor gets it. I do not know what he does with it.

Q. You do not know what record he keeps of it?

A. No.

Q. They are rather important documents, part of your

earnings, part of your income, aren't they? They affect your income.

A. I do not know as they are. It is past history.

Q. Do you know whether or not you do keep any record?

A. No, I do not.

Q. You have no knowledge?

A. No.

Q. You do not recall having had any experience of having to correct a freight bill with the railroad company?

A. No, sir.

Q. What do you look for, Mr. Wood, when you glance over Institute statistics?

A. Well, I do not glance over them very, very much. I like to see how—whether a bid is going up or down. We usually know that, anyway. I do not pay much attention to them.

Q. No. I think you said on direct that you do look over them.

29865 A. I look over them.

Q. I just want to know what a cement man, particularly you, look for when you look at those Institute figures.

A. Just to see whether it is going up or down.

Q. What is going up or down?

A. The business, shipments.

Q. Anything else of interest that you get out of the statistics? Do you make any particular referance to the individual company's shipments?

A. No, sir.

Q. That does not add or detract from—

A. No.

Q. That is, you do not pace yourself as against any particular one of your competitors?

A. No, sir. No, sir.

Q. So far as you are concerned, then, the Bureau of Mines' statistics are adequate, are they not?

A. Well, I see them occasionally.

Q. I say, so far as you are concerned, they are adequate, and the Institute statistics are superfluous?

A. Well, I can't say that. I look over both occasionally.

Q. What do you get by looking over both that you would not get by looking at the Bureau of Mines' statistics?

A. The Bureau of Mines, I believe, which I do not see

very often, gives you the total shipments, and the
29866 Institute more or less are the same thing.

Q. Then, is the one superfluous?

A. Well, I don't know——you might say—I don't know how to answer that, whether you call it superfluous. I might see one one month and might not see the other for two or three months.

Q. It would not make a great deal of difference to you whether or not the Institute statistics were continued or not, then?

A. Either one of them would not make a bit of difference to me, the Bureau of Mines or the Institute.

Q. Are the statistics issued by the Bureau of Mines adequate for your purposes, Mr. Wood?

A. Yes.

Q. Are you a member of The Cement Institute?

A. Yes.

Q. You pay dues in connection with your membership?

A. What is that?

Q. Do you pay dues in connection with your membership?

A. Yes, sir.

Q. Part of those dues, to your knowledge, are paid for the statistical service, are they not?

29867 A. Yes, sir.

Q. Have you ever protested the spending of that money?

A. No, sir.

Q. Why do you subscribe and pay out good money for something that is not good?

A. The freight rate books help us quite a bit in checking.

Q. How do they help you?

A. Well, the freight rates carry the freight rate to the various points. We have a chance to check. That is all we use them for. If we did not have those, we would have to use the traffic.

Q. You use the freight rate books to make delivered price quotations; is that it?

A. Yes; that is right.

Q. In other words, your method of making up delivered prices is to take the base point that you find prevailing and add the freight in the freight rate book?

A. Meeting prices; right.

But that is—if one located where you are adds the freight in the Institute book to the base point in the particular area in which you are selling, you will be meeting competition, as you put it?

A. Yes, sir.

Q. It will put you in at the lowest figure?

A. Yes.

29868 Q. All right.

How many base points are involved in your sales territory?

A. I believe only about one.

Q. In other words, all that you have to watch is one base point?

A. One base point.

Q. What is that?

A. Ironton.

Q. Then, your pricing is comparatively simple for you, is it not?

A. Very simple.

Q. You simply add the freight in the Institute book to that base point.

How many changes in base point price have you had in the year 1939, let us say?

A. None.

Q. '38, were there any?

A. I don't think there was.

Q. Was there in '37? Do you recall?

A. I think early '37 there was a change, as I remember. I wouldn't say for sure.

Q. '36 and '35?

A. I couldn't say offhand about that.

Q. Well, it does not change very frequently?

29869 A. No.

Q. Then, do you know how many corrections you get to the Institute freight rate book?

A. Very, very few, I imagine.

Q. When you get a correction from the Institute, does that change the delivered price at the destination?

A. No, I don't think so.

Q. Referred to in the correction sheet?

A. I don't think so.

Q. Well, the correction sheet replaces the rate that is in the book, doesn't it?

A. If there are any rates changed, yes.

Q. Yes.

If an emergency charge has been lifted, for instance, a correction sheet is sent out by the Institute?

A. Right.

Q. And you, after receiving that correction sheet, make your delivered price by using—

A. The new.

Q. —the new rate?

A. The correct rate.

Q. Yes.

A. Right.

Q. And if your billing clerk, for instance, was studying out a route, finding a route, and learned of a new
29870 rate, or learned of the lifting of an emergency charge, he would not use that rate, would he, until he received word from the Institute confirming it?

A. We would use it the minute we found there is any difference in the accurate rate.

Q. That would put you low, wouldn't it?

A. I don't know.

Q. Or high?

A. I don't know.

Q. Do you know of any business that you have taken by using the freight rate different from that in the Institute book, or correction sheet in the Institute book?

A. No, I couldn't say.

Q. You cannot recall in your experience ever having taken business by using a different freight rate?

A. We have. As I remember, once we had an Institute rate that was correct.

Q. What case was that?

A. I believe it was during the time of the building of Red House, W. Va.

Q. At what city?

A. Red House.

Q. The red house, W. Va.?

A. Yes, that is right.

Q. They were building what? I did not get that.
29871 A. Red House.

Q. Oh, that is the town.

A. Yes. That is Mrs. Roosevelt's pet hobby, building in that section.

Q. That is fairly recent, then, isn't it?

A. Within the last three years, I reckon.

Q. What rate did you use there?

A. We used—I believe the rate was 8 cents. The correct rate should have been 8½.

Q. You got the business, then, did you?

A. No—we got the business, as far as that goes, but we lost a little bit what we figured we ought to get.

Q. Well, you might not have gotten the business had you used the 8½; isn't that true? Your competitors would have used the 8½, didn't they?

A. Well, I presume all the competitors used the 8, the same as we did.

Q. How did you happen to get the business?

A. Good salesmanship; that is all I can say.

Q. Will you explain the use of that 8 instead of 8½?

A. No, I can't explain it. I don't know just why.

Q. Where did you get it?

A. The railroads took it at 8.

Q. Where did you get it?

29872 A. We got it through the freight rate books and put the 8 on the bill-of-lading, and the railroads accepted it as 8—one particular case.

Q. Well, how did you happen to say that you used an incorrect rate? I do not understand how anything is incorrect there.

A. I don't quite get you.

Q. You said when you started that you used an incorrect rate.

A. We did not know at the time we billed it that the 8 was wrong. We found it out later.

Q. How did you find it out?

A. When the bill came back with the 8½ on it.

Q. That is what I was asking about, you see—

A. Yes.

Q. —earlier in your examination.

Now, your memory is refreshed.

A. I remember that one. I recall that.

Q. In other words, it was the Institute book rate in that particular instance that was wrong?

A. It was a sort of a complicated destination. One of the companies was the B. & O.-New York Central, and the C. & O.-New York Central. The C. & O.-New York Central was 8 and the B. & O.-New York Central happened to be 8½.

Q. What correspondence did you receive in connection with that?

29873 A. Oh, we fought the thing for about a year, I guess, with the railroads, and finally had to pay it.

Q. Well, did you say the competition—your competitors used the 8, also?

A. I believe they did, yes.

Q. Well, in that particular case, then, you netted less than you contemplated, didn't you?

A. That is it, exactly.

Q. And your delivered price was not really your price at all, was it?

A. Destination price did not change any.

Q. Well, let me see. You intended to sell that cement at the base plus freight?

A. Right.

Q. But you sold it for less than the base plus freight?

A. Right.

Q. What was the price of the cement there in that instance?

A. I couldn't tell you the price, but after the mistake was found we shipped C. & O.-New York Central and it still remained 8.

Q. What would you consider the price was in that transaction? What was the price in that transaction?

A. Oh, I forgot the destination price.

Q. No. Which end of it—which figure represents the price there, in your estimation?

29874 Q. Now, under the new method that you have adopted now, 1940, Mr. Wood, you calculate the exact amount of the freight?

A. No, sir.

Q. Well, what do you put on the—

A. Are you speaking of bill-of lading or invoice?

Q. The invoice first.

A. So much destination delivered price, no freight allowance. Is that what you mean?

Q. Yes.

A. Yes, sir.

Q. And then you get a freight bill immediately from the shipping clerk at the—

A. At the shipping point we get the freight bill and we pay it ourselves.

Q. How much more cash do you—how much cash 29875 do you have to have on hand to handle that proposition?

A. Why, I believe it is going to cost us about $50,000 in order to carry the credit, and so on, the additional working capital.

Q. Fifty thousand dollars per year?

A. Yes.

Q. And then you calculate the exact amount of freight and in order to be sure that the railroad does not overcharge you—

A. Oh, yes, yes.

Q. In other words, you put on a traffic clerk there, I suppose?

A. Yes, sir.

Q. Or are you able to get along with the same staff that you had?

A. The same staff exactly.

Q. What do you pay for cement, standard Portland, that you buy from competitors?

A. At Kenova?

Q. Yes.

A. We do not buy it.

Q. Well, you did during the flood, or something.

A. Well, that was destination—

Q. Well, how does the price, the price to you, compare with the price that they charge to customers?

A. We charged our customers a regular price.

29876 Q. Yes, you did, but what did the manufacturing company charge you?

A. I think we had a 10-cent barrel manufactured price, something like that; very little.

I think our quarry supply is good for about 70 years of selling at the rate of 600,000 barrels per year. There is about 30 days leeway with break-downs on 600,000 barrel estimate. If we would put that machinery to capacity production, we could continue without adding any more kilns for an indefinite number of years. In other words, if we anticipated a demand of 600,000 barrels next year, we would not need to increase our plant this year.

29877 Q. Have you had seasonal demands which you could not meet promptly?

A. No, sir.

Q. Have you ever had occasion to ship out of your normal territory to fill demands there?

A. No, sir.

Q. Oh, go back on the freight rate subject. I have another question.

On border lines, how do you tell which freight rate applies?

A. On border lines?

Q. On border lines, I mean border lines between areas controlled by different basing points, do you have any difficulties there?

A. No, sir.

Q. Is there a clear line of demarcation?—

A. No, sir.

Q. —between each base?

A. No, sir.

Q. That is, I mean—I think you said Ironton was your controlling base point.

A. Base point; yes, sir.

Q. Well, Ironton would reach out and meet with Birmingham, I suppose, doesn't it, somewhere?

A. Well, it is pretty far-fetched, but they could, yes.

29878 Q. Well, they reach out and meet with some basing point in the South. Which one?

A. Well, I could not tell you right offhand.

Q. Well, I am just wondering whether one basing-point area meets another if there is any difficulty in ascertaining which basing-point price should be determined upon.

A. No, I can't answer that.

Q. That is, you recall none?

A. There is no marked line, no.

Q. But your rule of thumb, as lowest combination of base point plus freight.

A. Right.

Q. I just wondered if the rule of thumb works perfectly or if it is actually a rule of thumb which sometimes has exceptions.

A. It is limited as far as we are concerned with certain mill net which we do not go below. We might, by going along, hit that border line you refer to; we would not reach it.

Q. I see. In other words, you are completely within the—

A. Yes.

Q. —Ironton range there?

A. Yes.

Q. Before the Institute published freight rate books

you said on direct that you had some difficulty in figuring back to find the base point.

29879 A. Yes, sir.

Q. And I suppose it follows that the matter of figuring back has been simplified since you have the Institute freight rate book.

A. Yes, sir.

Q. And you can use those to determine the freight rate upon which the delivered price at any particular point is built up.

A. For checking purposes; yes, sir.

Q. Is that one of the main advantages of the Institute freight rate books, as far as you are concerned?

A. As far as we are concerned, yes.

Q. Is your mill town carried as a headline point in the freight rate book?

A. I believe it is at the present time. At one time I do not believe it was.

Q. Do you know when?

A. I could not say offhand.

Q. You said on direct that the Institute had never had anything to do with determining your prices. Let me ask you if that is entirely correct in view of the fact that the Institute supplies you with the freight rates, the books, and they are so closely related to pricing in the cement industry.

A. The Cement Institute does not set our price.

Q. No, they do not set your prices.

A. No, sir.

29880 Q. I understand you to say that; but you said in answer to Mr. Leisure's question that the Institute had not anything to do with determining your prices.

A. They have not.

Q. Well, they supply with you a memorandum whereby you can—

A. Check.

Q. —check.

A. Yes, sir.

Q. Well, it is a little more than check. You can practically determine prices, isn't that true?

A. Meet the competition, right.

Q. In other words, you do not independently determine your price, do you?

A. It is base plus freight that covers.

Q. And the freight, since the Institute supplies you the freight rate, it is not quite correct that they do not do anything with regard to determining prices, is it?

A. Well, we could use the railroad rates.

Q. You could, but you do not.

A. No, because they are more complicated.

Q. Yes.

A. Hard to figure out.

Q. That was a broad statement, it seemed to me, that the Institute had nothing to do with determining prices, so wouldn't you feel that it is more correct to say

29881 that they have something to do?

A. No, sir; I would not say that.

Q. You would not say that?

A. No, sir.

Q. Did I understand you to say on direct that no one, to your knowledge, has requested the privilege of transporting cement by truck from your mill?

A. Has requested the transportation?

Q. The privilege of transporting cement by truck.

A. No, sir.

Q. You do not recall any request by anyone who wanted to transport cement by truck?

A. Several years ago during the trucking period there was a few asked, yes, but after it stopped nobody has ever made a request.

Q. The requests terminated with the adoption of the policy on your part that you would not allow trucking; is that correct?

A. No, I would not say that. We were to meet competition, and somebody started trucking, and we trucked and discovered that the dealers in our territory were not satisfied, and we quit.

Q. When did you quit, do you recall?

A. When?

Q. Yes.

29882 A. Oh, I could not tell you. The trucking, I do not believe, was in over thirty or forty days, something like that. I do not know what year it was. I have forgotten.

Q. Well, weren't there a few straggling demands for trucking after that?

A. How?

Q. Weren't there a few straggling calls?

A. No; everybody seemed to be happy to get rid of the darned thing.

Q. Was it only the dealers that did truck from you?

A. Close by.

Q. None of the farmers?

A. No, no.

Q. Contractors?

A. No.

Q. Public utilities?

A. No.

Q. Municipalities?

A. No.

Q. Didn't any of the highway contractors want to drive their trucks up there?

A. It was so unsatisfactory, delays and breakdowns, delays at the plant getting loaded, I think they were just as happy to get rid of it as we were.

Q. Didn't any of the highway contractors want
29883 to truck cement to any particular point?

A. Not that I recollect.

Q. You do not recollect any requests lately for it?

A. No.

Q. I believe you said on direct that you had never done anything to thwart the Government in getting bids f.o.b. mill,—was that your position on direct?

A. Yes, sir.

Q. Well, you refused to bid f.o.b. mill, did you not?

A. Yes, sir.

Q. You helped to support the Institute, did you not?

A. Yes, sir.

By Mr. Paulson:

Q. You sold and you do sell exclusively at delivered prices, do you not?

A. Yes, sir.

Q. You use the Institute freight rate books as price books, do you not?

A. Yes, sir.

Q. You follow the leadership of your competitor, do you not?

A. Meet competition.

Q. You never inaugurated new policies or vary
29884 the old ones, do you?

A. No, sir.

Q. You refuse to allow trucking?

A. Yes, sir.

Q. You use rail rates when you ship by barge?

A. Yes, sir.

Q. And yet you say you have never done anything to thwart the Government in getting bids f.o.b. mill. Would you want to change that statement?

A. As far as the Government bids are concerned, usually they are contracts of such and such a size that we are just out of it. We do not bid on it. We do not do anything to stop them.

Q. But why don't you bid on them?

A. We are not large enough. We are just a small, small company. Our success has been in our ability to control business around or get business around our plant.

Q. You are anxious to grow, aren't you?

A. How?

Q. You are anxious to grow and expand, aren't you?

A. We will grow with the company as it grows. That will be very slow around in there, I imagine.

Q. Well, you could grow a little faster if you did some f.o.b. bidding, couldn't you?

A. I do not think so. I do not think it would make a bit of difference.

29885 Q. Well, you would be able to get business away from your competitors, wouldn't you?

A. I do not think so. Probably competitors would do the same thing and there you would be, the same position.

Q. You think it is better to leave status quo alone?

A. Well enough alone.

Q. Well, is the present method of marketing entirely satisfactory with you?

A. Very satisfactory.

Q. You haven't any complaint against the way you or your competitors market cement?

A. No, we do not pay much attention to our competitors. We just meet competition and try and keep a satisfied customer all the time. We do not worry about our competitors at all.

Q. This case involves marketing methods of the cement industry. I just wanted to get your reaction to the marketing methods as they stand, whether or not you consider them perfectly satisfactory or whether you, yourself, could offer some corrections.

A. It is pretty good as it is, I would say.

Q. Is there anything wrong with it that you know of?
A. Oh, I do not know. I do not think I could find—
Q. It is a little difficult for a small company to grow, isn't it?
A. Yes, competition is keen.
29886 Q. Well, your expenses are very high.
A. Per barrel against the other fellows, certainly, costs are much higher than the big fellows'.
Q. Well, some wastes are involved in this method, aren't they?
A. Well there is a little but we watch that pretty carefully.
Q. Salesmen's costs, the cost of selling are high, are they not?
A. Fairly high, yes.
Q. Thirty-five or forty cents a barrel?
A. I would not say quite that much.
Q. You have to ship out of your normal territory, do you not?
A. We do not have to ship out of that; very seldom do.
Q. Well, in order to keep running at half way full capacity you have to reach out great distances, do you not?
A. No. The plant is so constructed that it is so flexible that after we dispose of 15,000 barrels we break even from then on; we try to make a little money.
Q. Fifteen thousand annually?
A. No, monthly. That business picks up, why, we add, and if it goes down, we cut down.
Q. Well, suppose you would run at 30,000 monthly, would that reduce your costs per barrel by 50 percent?
A. It would reduce the cost of overhead only.
29887 Q. Well, it would enable you to split it right in half, wouldn't it, you would be able to spread—in other words, each barrel would only bear half as much as before; I guess that is a pure matter of arithmetic there.
A. I imagine so, yes.
Q. You are located on the Ohio River.
A. Yes, sir.
Q. I think you said on direct that barge rates to Charleston were higher than the rail rates?
A. Yes, sir.
Q. How about down the river to— Well, I do not know what is down the river. What town is a town down the river?

A. Oh, Cincinnati is below.

Q. How about the rates by barge?

A. Right offhand I do not know what the Union Barge Line rate is to Cincinnati. We have not shipped there in a number—in a number of years.

Q. How about Portsmouth?

A. I do not know what rate is there; that is below.

Q. It would be lower going down the river than rail rates?

A. I imagine it would be a trifle lower.

Q. Why don't you use the barge rates in figuring your delivered prices going down where they are lower?

A. The dealers are not equipped to handle the barge shipments, and then another thing, a barge will hold
29888 about 15 carloads of cement, and it requires a lot of cash to put out for 15 carloads, where you can get rail delivery and only have to lay out for one car, spot it alongside of his warehouse. The barge makes it necessary to haul from the barge up the bank into the warehouse. The railroad delivery is the most satisfactory in our section.

Q. Is your mill located so that you could load a barge right from the mill?

A. Yes, sir.

Q. It is simpler to load a barge at your end of the angle than it is to load a railroad car?

A. No, sir.

Q. Do you have your own barges?

A. They were sold within the last 10 days. We owned them at one time, yes. Now they are gone.

Q. Did you transport some of the cement down the river by barge?

A. Yes, years ago, I think in—

Q. Up to how long ago?

A. I think in 1931 we discontinued.

Q. And before that did you deliver by barge?

A. Yes.

Q. For some period?

A. Yes.

Q. A good deal of cement?

29889 A. Well, I would not say so very much in the course of a year; maybe forty or fifty thousand barrels, something like that.

Q. That would be a substantial portion of your business at that time; wasn't it?

A. It was.

Q. In other words, you used to sell down the river at the railroad delivered prices and then deliver by barge?

A. Yes, sir.

Q. Well, how did you explain the fact that you have quit delivering by barge? What happened there?

A. The cost of maintaining a wharf boat, attendants, bookkeeping, offset the rail. It cost us more by boat than rail and we discontinued it.

Q. Well, you had the boats.

A. Sold.

Q. Well, but it was profitable, as I understand you, up to 1931, and then all of sudden it became unprofitable.

A. I did not say it was profitable. I said we shipped.

Q. Well, am I right that in assuming that in the course of the time that you did ship by barge some of the dealers down the line there built facilities for unloading those barges?

A. No.

Q. How many barges did you have?

A. At that time we had nine and a wharf boat at Cincinnati.

29890 Q. What would be the approximate value of the barge equipment you had?

A. All ten units?

Q. Yes.

A. Oh, I would say $150,000.

Q. Well, is it your experience that other industrial goods move down the river by barge?

A. I do not think there is any cement moving down. There is steel and coal, lots of that, but usually the coal people, particularly, they are equipped for unloading; usually it is re-shipped by rail. They have been in business a long while and they have an enormous amount of investment, and they are able to do it.

Q. But there is nothing in the intrinsic nature of the product which makes barge shipments less available for the transportation of cement than for steel or coal?

A. Oh, no.

Q. Did the Institute or any member of the cement industry contact you with regard to the use of barges?

A. No, sir.

Q. Did you file with the Code Authority barge rates?
A. No, sir.
Q. Did you at any time transfer the savings through the use of barges to customers?
A. No, sir.
29861 Q. Mr. Wood, what percent of your annual sales are made on a contractual basis?
A. At the present time, none.
Q. You do not use contracts at all?
A. No.
Q. You do not use specific job contracts?
A. No, sir.
Q. Well, what is the arrangement with your customers? Is it simply that they place an order and you fill it?
A. Yes, sir.
Q. Do you assume loss in transit?
A. Yes, sir.
Q. I am speaking now, of course—
A. Material—material damages, you mean?
Q. Yes.
A. Yes, sir.
Q. I am speaking, of course, of the period prior to this change in your method here in January.
A. Yes, sir.
Q. Did you have ever occasion to attempt to col-
29892 lect damages from the railroads for damage in transit?
A. I believe once or twice there has been damages that we have collected.
Q. And you do that in the name of the dealer?
A. No, sir; in our own name.
Q. Are you sure of that?
A. Yes, sir.
Trial Examiner Norwood: Well, that is when you prepay the freight, or is there any difference between your method there, between the occasions where you pay the freight and where you do not?
The Witness: We go after the railroads and collect the damages. If the freight, previous to January 2, was billed at a price less freight, why, we would, after the claim was settled, we would return the damages to the dealer. In other words, we did the work for him.
By Mr. Paulson:
Q. That is what I mean to ask you.

A. Yes.

Q. In other words, you really made the claim in his name?

A. No, it was made in our name, I believe.

Q. Well, did your attorneys handle that, or something?

A. Our auditor.

Q. You are not sure, then, whether he just did the work over the name, using the name or the dealer, or not, are you?

29893 A. Well, as I recall, the checks come into us and we endorse them over to the dealer, so it must have been in our name.

Q. That is, the check for the damages from the railroads were made out to you; that is your recollection?

A. Yes, sir.

Q. Do you have a very distinct recollection on that?

A. Well, I am pretty sure, and sign the checks and endorse them, so I see them all, so if there is any—

Q. How often do you have damage in transit?

A. They are so few I do not recall one the last couple of years.

Q. Did you have a meeting of the board of directors and other officials of your company before you changed your sales policy and adopted this prepaid—

A. No, sir.

Q. —policy?

A. No, sir.

Q. Did you decide that?

A. Yes, sir.

Q. Do you mind just telling the circumstances under which you changed?

A. It was necessary to meet competition. When I found out what was going on, I called one of the directors. He said, "How much money does it mean?" Approximately so much. "What else does it mean?" A little tighter rein on credits. All that to meet competition.

29894 That is all there was to it.

Q. Where did you receive the first word?

A. When or where?

Q. I want to ask you both, if you can tell me both at the same time.

A. All right. January 1st, New Years, I was in the office. I opened up the mail. One of our salesmen had a note that he had found in Kentucky where the cement company, one cement company, was prepaying freight.

Tuesday morning our Huntington salesman picked up cards from one of our dealers prepaying freight. After he had picked that up, I got in touch with one of our directors and gave him the dope.

That is the answer.

Q. Was that the first knowledge?

A. Yes, sir.

Q. Haven't you heard it discussed in the industry before?

A. No, sir. It came out of a clear sky.

Q. Which one of your competitors was it, to your knowledge?

A. I think the plant at Chattanooga, Tenn.

Q. Single Mount?

A. Single Mount, I believe, that is the one.

Q. What company had given the notice to the dealers on the cards about which you spoke?

A. Alpha was one of them.

29895 Q. Did you learn anything subsequently in regard to this change?

A. Not a thing.

Q. Mr. Wood, on direct, Mr. Leisure asked you something about your company's relations to other companies, particularly their physical relations, or the corporate relations. I believe you said you had no connections with any other company, any other cement manufacturing company.

A. Correct.

Q. Do you know a Mr. Albert P. Myer?

A. I know of him, yes.

Q. Did he at any time have a stock interest or serve as an officer of the Green Bag Company, of which you are an officer?

A. I believe he served as a sort of an officer for a while.

Q. Do you know what office?

A. He had no stock. I think he was—I believe he was secretary.

Q. When was that?

A. Oh, in the year of '31, I believe.

Q. How long a period?

A. Not long.

Q. Was he at that time an officer of any other company?

A. Not that I know of.

Q. Do you know what he is doing now?

A. I do not.

29896 Q. You do not know whether he is or is not general manager of the Green Bag Cement Company of Pennsylvania?

A. I couldn't say.

Q. Do you know whether in 1931 he was an officer of any other company?

A. I couldn't say.

Q. Were you an officer of your company in 1931?

A. No, sir.

Q. What is the $50,000 additional cost going to mean in the way of selling cement so far as you are concerned? Are you going to have to reach out into new fields?

A. No, sir.

Q. Well, how are you going to earn that $50,000?

A. Interest on the investment, you mean, of $50,000? I guess it would be a dead loss to us.

Trial Examiner Norwood: Would you raise the price to pick that up?

The Witness: I would like to, yes. Meet competition.

29897 Q. When you did allow trucking, did you alter your plant or make any arrangements to facilitate delivery to trucks?

A. No, sir.

Q. Then, how did you load the trucks?

A. The plant was originally designed for carloading and it disturbed the car loading because there had to be a space left in there for the trucks to back up. Very, very unsatisfactory for both loading car and truck.

Q. Well, how much did you estimate it would cost you to alter that situation so as to avoid that conflict?

A. I never figured it, never figured it.

Q. Well, have you any idea what it would cost you to make transportation, loading to trucks?

A. It would be worse now than it was then, because we have a flood in the way.

29898 BEN W. CALVIN, called as a witness for respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Withrow.

I am president of Aetna Portland Cement Com-
28899 pany, and have been president since August 1939. Prior to that time I was vice president and general manager, and held that position from August 1, 1936, when I first became associated with the Aetna Company. As president of Aetna I am in charge of the operation, general manager of the company, in charge of production and sales.

Q. Who first approached you about taking a job with this company?

A. Mr. Johnson.

Q. And do you know about when?

A. That was—the first definite approach, you might say, was probably along in May of '36, although before that time he had talked to me in a rather hinting way that he might want me to come over.

Q. When were you first offered the job with the Aetna Company?

A. Well, the actual offer came in the first part of July of 1936.

29900 Q. And where was the offer made?

A. In Boston.

Q. Why did you go to Boston?

A. Mr. Johnson wrote me a letter and asked me to come to Boston.

Q. And would you tell us what took place when you were in Boston, when you went to Boston?

A. Well, he had written to me, and he had spoken to me before about the possibility of wanting me to come with the company, and when I got to Boston he and Mr. Bolster and myself talked about the general situation of my taking this job.

Q. I believe you said this was in July, 1936. Can you fix the date a little bit closer?

A. Well, as near as I can fix it, it was shortly after the fourth of July. I would guess it was about the 8th, 9th, or 10th.

Q. Did you inform the company with whom you were

previously associated concerning this conversation with Mr. Johnson?

A. I did afterwards, because at that time, at the time I was in Boston and accepted the job with Aetna, and then some time afterwards, I imagine a week or within a week, I went to Chicago and told Bill Storey that I had this new job and that I was going to leave the Consolidated Cement Corporation.

Q. Was that the first time you told Mr. Storey about the possibility of going with the Aetna Company?

29901 A. Yes, sir.

Q. And what did he say when you told him that?

A. Well, he said—I think he first asked me when I wanted to leave, and I told him the sooner I could leave I thought it would be better for me and better for the company; that is, the Consolidated Cement Corporation. He wanted me to stay, I think, 60 days more, and we finally settled on August 1st.

Q. Why did you make this change from Consolidated Company to the Aetna Company?

A. Well, it was a better job in many respects. It paid a much better salary, I guess something more than twice what I was getting.

Q. Were there any considerations besides salary?

A. Well, naturally, it was a position as general manager and vice-president, which was a good deal more responsibility, and it looked to me as if it presented a good deal better future and opportunity than the job I had.

Q. Did you accept the job with the Aetna Company because of any agreement among the cement companies in Michigan?

A. No.

Q. Did you consult officials of any cement company before accepting the position?

A. I did not.

Trial Examiner Norwood: Do you mean some agreements to which he was a party?

29902 Mr. Withrow: Any agreements that he knows about which affected his taking the job, is what I asked him about.

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. I believe you said you were hired as general manager. Whose position were you to take with the Aetna?

A. Mr. Lingeman's.

The witness identified Resp. Ex. 1964 as a letter he received; Resp. Ex. 1965 as a letter he received; Resp. Ex. 1966 as a letter he received; Resp. Ex. 1967 as a
29903 letter he received. They are all dealers of cement.

He knows that these three handled Aetna cement (indicating) but whether this one did or not, he does not know. By "this one" he refers to Fort Wayne Builder Supply Company. He was a very good friend of the witness, but the witness does not know whether he bought cement or not.

Examination on Voir Dire by Mr. MacIntyre.

Q. Referring to Respondents' Exhibit, for identification, 1967, Mr. Calvin, do you know the gentleman who wrote that letter?

A. Yes, I know John Suelzer.

Q. Who is he?

29904 A. John Suelzer has been connected with the Fort Wayne Builders Supply Company for ten or fifteen years, that I know of. He is now always talked about in connection with the running of that company.

Q. Is he the John Suelzer that also served as an official of the Indiana Building Supply Association?

A. Why, he probably is. I know John Suelzer has been somewhat active in dealer association affairs.

Q. Well, can you tell us whether or not that is the same man? We are attempting to find out who the man is who wrote the letter that your counsel is offering here.

Q. Can you tell us from your own knowledge whether or not that is a fact?

A. Ask the question again.

Q. That is, whether the John Suelzer who wrote this letter is the same John Suelzer who served as an
29905 official of the Indiana Building Supply Association.

A. Yes, it is the same man.

29914 Afternoon Session—2 P. M.

Trial Examiner Norwood: Please, come to order, gentlemen.

Proceed.

I want to state with regard to the motion of the Commission's Counsel, as stated in lines 2 to 15 on page 29669, I will deny the motion to strike the testimony enumerated there.

Did this go into the record?

Mr. MacIntyre: The enumeration of the lines and pages is not in the record; the enumeration has not been in the record up to this time.

Trial Examiner Norwood: I show that I deny there certain statements as to cost, and after giving those statements the witness testifies that the price was not determined by cost, and so far as to receiving those to show what the costs were, I will state now that those statements will not be considered for that, but they will be considered to explain what the official of that company had in mind when he changed the price.

Mr. MacIntyre: If Your Honor please, may we ask that in view of the ruling that the Reporter copy the statement that I have submitted to you showing pages and lines that we did move to strike and to which you have just made reference?

29915 Trial Examiner Norwood: That motion to strike which I have just denied refers to the following testimony:

Line 25, page 29551, to line 7, page 29553, inclusive.
Line 7, page 29559, to line 18, page 29559, inclusive.
Line 13, page 29565, to line 18, page 29565, inclusive.
Line 25, page 29567, the word "costs" only.
Line 9, page 29568, to line 15, page 29568, inclusive.
Line 10, page 29569, to line 19, page 29569, inclusive.
Line 24, page 29572, to line 4, page 29573, inclusive.
Line 4, page 29575, to line 24, page 29578, inclusive.
Line 20, page 29579, to line 24, page 29579, inclusive.
Line 18, page 29611, to line 8, page 29612, inclusive.
Line 4, page 29613.

The motion also includes the following testimony which was developed on cross-examination if the motion is al-

lowed on the testimony cited above, as given on di-
29916 rect examination:

Line 23, page 29660, to line 25, page 29660, inclusive.

Line 20, page 29666, to line 25, page 29666, inclusive.

Line 15, page 29667, to line 1, page 29669, inclusive.

Mr. MacIntyre: If Your Honor please, may we inquire at this time whether or not this testimony is admitted, which you have refused to strike, which is now in the record apparently to stay, we are permitted to meet any of its other implications than the one condition to which you have attached to it?

Mr. Leisure: If Your Honor please, it seems to me the proper time to take that up is when there is something pending. At the present time there is a motion made and there has been a ruling. Now, that ends that episode. I object to going into it further unless there is something pending. We have got a witness on the stand.

Trial Examiner Norwood: He has stated in there one place he was influenced by the costs there, and these statements come in to complete his testimony as to that. Now, of course, the Commission may put forward any evidence that would show that he was not influenced thereby, and
they also urge that the direct examination state-
29917 ments of the witness would refute that, but I see no reason for striking it on that ground.

Mr. MacIntyre: There is nothing to prevent us from showing that the price was not as low in the cement industry to bring about the results and the claim that he at that time was observing it.

Trial Examiner Norwood: I think so.

BEN W. CALVIN thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow (Continued).

Q. I believe when you stopped this morning, Mr. Calvin, that you testified that in July, 1936, you had taken the position that you ought to be free to select your own staff in Michigan. Were you given that right?

A. Yes, I was.

Q. What was Mr. Cree's job with the Aetna Company?

A. Cree was the sales manager.

Q. On record page 496 Mr. Cree testified that he was the traffic manager of the Aetna Company. Did he ever hold that position, to your knowledge?

29918 Trial Examiner Norwood: Now, you may tell us whether or not he was holding that position when you took charge.

The Witness: He was not.

By Mr. Withrow:

Q. Do you know whether Mr. Cree ever held that position?

29919 A. No one ever held that position with the Aetna Cement Company.

Q. At the conference you had with Mr. Bolster and Mr. Johnson in July of 1936 did you discuss the question of retaining Cree?

A. Yes, we did.

29920 Q. Would you tell us what took place?

A. Well, during that conversation I asked Mr. Johnson and Mr. Bolster what their idea was about Cree. They had talked to me about taking Lingeman's job and said Lingeman was going to retire. They did not tell me at first what their idea was, rather sounding me out on what I had in mind, and I told them that I did not want Cree to remain in the organization if I took the job as general manager.

Q. Was this request of yours to get rid of Cree made pursuant to any agreement with any of your competitors?

A. No.

Q. Was it made as the result of any pressure exerted on you by any of your competitors?

A. No.

Q. Did you ever discuss this matter of discharging Cree with your competitors before Cree was discharged?

A. No.

29923 Trial Examiner Norwood: Well, did you discharge Mr. Cree?

The Witness: Mr. Johnson actually told him he was discharged.

Trial Examiner Norwood: You made it a condition of your employment that Cree was to go; is that right?

The Witness: Practically. It was this way: I told them if they did not discharge him the first thing I would

do the first day I was manager of that company was to discharge Cree.

29925 By Mr. Withrow:

Q. When did you actually start to work for the Aetna Company, Mr. Calvin?

A. My salary started on August 1, 1936.

Q. Did you do anything for Mr. Johnson before that date?

A. Mr. Johnson asked me to meet him in Detroit a week before August 1st. I think August 1st fell on Monday, or it might have been Tuesday; it was the early part of the week. And so I went over to Detroit about the middle of the preceding week and met him at the Book-Cadillac Hotel.

Q. Did Mr. Johnson tell you what he was doing at that time?

A. He mentioned that he had had a talk with Lingeman, and that Lingeman had resigned, and he said he had talked to Harold Cree, and that Harold Cree was putting up a lot of resistance about resigning.

Q. So that Mr. Cree was still employed by the Aetna Company when you arrived in Detroit?

A. Yes, he was still on there.

Q. And what did you do?

29926 A. Well, Mr. Johnson questioned me as to whether I was sure that we could not use Harold Cree, and I told him we could not. I did not want him there, that I thought it would be better for him to let him go than it would be for me, so he said all right, he would take care of it, and I think it was the next morning that he did it.

Q. Were you a party to any agreement with any cement manufacturer or manufacturers to compel the resignation or discharge of Harold Cree?

A. I was not.

Q. Now, will you tell the Examiner why you wanted Cree to be discharged?

A. Well, in the first place, I have a very poor opinion of Mr. Cree's ability as a good cement merchandiser. I knew his general ideas of selling cement were not in accord with mine. I did not think I could change his habits. I did not think he would be willing to change for me, and I did not see how we could get along. In addition to that,

Mr. Cree did not have a good reputation in Michigan, which is our principal market, with the buyers of cement, that is, the contractors, the dealers, the highway departments, the county purchasing agents, and those people; I did not like his reputation. I did not want him with the company. I thought he would be a liability to me.

Q. On record pages 1056 and 1057 there is some
29927 testimony about a victory dinner given by Mr. Johnson commemorating Mr. Cree's discharge. Do you know of any such victory dinner?

A. There was no victory dinner of any kind.

Q. Was there any dinner given at the Book-Cadillac Hotel in celebration of Cree's discharge at Aetna's expense?

A. There was no dinner given in celebration of anything.

Q. Now, what was the financial condition of the Aetna Company when you took over the general managership?

29928 Trial Examiner Norwood: I hardly think it could. The objection is sustained.

Mr. Withrow: I offer to show through this witness that on August 1, 1936, the Aetna Company owed approximately a hundred thousand dollars in notes, and had only about $3,000 in cash on hand, and that there had been heavy losses during the preceding years of something over $700,000.

Trial Examiner Norwood: Go ahead.

The witness identified Resp. Exs. 1830-A and B and 1831-A and B as having been seen before by him. They sent a man into his company and he came in to see
29929 the witness, and the witness sent him into the accounting department and went in there with him to Aetna's auditor and gave him access to these figures. "They" means Price Waterhouse's representative; one of their men. These were prepared from Aetna's audit reports. The witness can vouch for the accuracy of those. He (not the witness) took them from "our" figures, in Aetna's books, and its audit reports.

Examination On Voir Dire by Mr. MacIntyre.

Q. Mr. Calvin, when you say you vouch for the accuracy of these, what do you mean?

A. I mean that these are, as near as I can tell from seeing them, exact copies of the figures which appear in our audit report made by certified public accountants.

Q. And who made those reports?

29930 A. Do you mean what certified public accountant?

Q. Yes.

A. Well, there were two. One firm was—no, one firm did all of this work. That is Staub Van Tiflin, and I have forgotten that third man's name—a well known Detroit outfit.

Q. Do you feel that you are equally as able to certify that they, as auditors' reports, are correct interpretations of the records upon which they are based as the auditors, themselves, were who made those reports?

Mr. Withrow: May we have that question read, Your Honor please?

Trial Examiner Norwood: Read it.

Mr. Withrow: I must confess that I do not understand it.

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Withrow: Your Honor, I object to the question. First, because it is unintelligible, and, second, it is not proper voir dire examination. This document purports to be only a summary of what the auditors' reports are, and there is no necessity of looking behind the auditors' reports, and they are not—

Trial Examiner Norwood: Well, he testifies as to the correctness of these figures, as I have said.

Mr. Withrow: I have no doubt that he could go
29931 into this on cross-examination to find out if he could not find some place, some figure for which this witness could not vouch, but he has vouched for the accuracy of these figures as against what is contained in the audit report. That is all the document purports to be.

Trial Examiner Norwood: I think the question was to the point.

I shall overrule the objection.

Do you think that you could testify to the accuracy of that as well as Price-Waterhouse could if they were here?

Mr. MacIntyre: No, we are talking about the auditors' reports now.

Mr. Withrow: He has gone one step back.

The Witness: Are you back to Staub-Van Tiflin and somebody?

Mr. MacIntyre: Yes.

The Witness: You will have to read that question again. It may be a clear question, but it is not clear to me.

Mr. MacIntyre: I think it is clear.

Trial Examiner Norwood: Read it.

(Question read.)

The Witness: Now, gentlemen, I am not a certified public accountant, but I know these are the figures
29932 that are in those auditors' reports because one of the first things I did when I got with the company was to dig out our old audit reports and start going over them. Now, these are the figures. Now, whether I am as good at it as Van Tiflin is, I do not know.

Mr. MacIntyre: We get right back, Your Honor please, to this point. We do not know whether the auditors' reports are correct, and this witness states he does not know whether they are correct or not, and the auditors are not brought here, so we object to it just as we did before, for the same reasons.

Trial Examiner Norwood: What do you want to prove by that, anyway, to corroborate Mr. Johnson's figures?

Mr. Withrow: To corroborate Mr. Johnson and to bring to bear whatever we can bring to bear upon the circumstances and situations of the Aetna Company in August, 1936.

Trial Examiner Norwood: Well, it is our usual custom to bring those auditors in if we want to prove some figures.

The objection is sustained.

By Mr. Withrow:

Q. Now, when you came with the Aetna Company in August, 1936, did you find complete records for the company?

A. Well, the records were very meager. They
29933 had a set of books in there, and that is about all.

Q. Would you tell us whether or not you had copies of back invoices on shipments of cement?

A. Oh, as far as that kind of records went, they did not even keep a copy of an invoice that they sent to a customer, and they had no general sales statistics that we usually have in the cement industry, or records of shipments. They had no records of contracts or obligations. The salesmen did not even make reports.

Trial Examiner Norwood: I think he may tell us whether or not when he took charge of this organization that it was the custom of the salesmen to make re-
29934 ports, if that is what he means by that question I shall overrule any objection, and you will answer and tell us what you found when you got there; not what somebody told you that happened some time before.

Mr. Withrow: He is telling us what he found, and that was the question.

Trial Examiner Norwood: Now, answer it from that aspect.

The Witness: Well, I have answered some of it. Frankly, it was not what you had found; it is what you did not find. There wasn't anything. They did not keep records. I could not find anything. It wan't in the office.

Trial Examiner Norwood: Well, did you find after you took charge that any salesmen sent in reports?

The Witness: No. Of course, I called in salesmen and asked them what happened and what they reported; who their specific accounts were. Then I found at that time they had three salesmen working over the territory doing as they pleased.

Trial Examiner Norwood: They told you they had not made reports?

The Witness: The average salesmen know they have to make reports. If you ask him if he made any, he would probably make some sort of half-way story of what
29935 he had been doing.

Trial Examiner Norwood: Well, do you know whether or not they had been making them by telephone?

The Witness: They would call up once in a while by telephone.

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. Would you tell us whether or not you found any copies of sales instructions?

A. No; none of any kind.

Q. I show you Commission's Exhibits 2218 and 2219, purporting to be quotations of the Alpha and Petoskey Companies in 1925.

When you came with the Aetna Company did you find any historical case like that going back to 1925?

A. No, I did not.

Q. Will you tell us whether or not you found the records of any of the current contracts of the Aetna Company when you came there?

A. Practically none were there.

Q. Was there any way in which you could find out what the commitments of the Aetna Company were as of August 1, 1936?

A. Not exactly. All you could find out was what you could get from different members of the company—talk to a salesman and ask him about his territory.

29936 Q. But no written records?

A. Practically none.

Q. And how did you find the morale of the sales employees in the Aetna Company?

A. Well, I would just say they were wandering about. They did not know what to do next, or what they were supposed to do. They seemed to lack direction altogether, and they were in a state of low morale generally; dissatisfied; did not know what was going to happen to the company next; worried about their own future.

By Mr. Withrow:

Q. You said there were three salesmen. You kept those three salesmen on, Mr. Calvin?

A. Yes, they are still with us.

Q. You told us what the morale of the sales employees was.

Now, what was the morale of the other employees of the Aetna Company?

Mr. MacIntyre: I object, if Your Honor please. Whether the fireman of the company was enthusias-

29937 tic about his job seems to me is beyond the issues here.

Trial Examiner Norwood: I do not see that you are going to prove anything by those things, showing that there was confusion in this company at the time of the change in management, and things like that. Now, if you could tie this in with Mr. Cree's inefficiency, you will have

to be more direct than that. You are giving conditions here that might result from a number of things.

29940 A. The morale of the men at that plant in the manufacturing site of the company was in as low a state as the sales, probably lower. I found out afterwards that two or three of the key men were looking around to see if they could find another job, because they were afraid the company was going broke and they would be out of employment.

By Mr. Withrow:

Q. Now, Miss Fowley testified about a conversation with you concerning Cree's ability to get a job.

Do you recall any such conversation with Miss Fowley?

29941 A. Yes, I recall it.

Q. Will you tell us what took place?

A. Well, if was at a time that somebody had either called me on the phone or written me a letter wanting a recommendation for Cree, who asked for a job, and I dictated a letter to Miss Fowley, trying to say all the nice things I could about Cree to help him get work, and she said something to the effect, "Well, I don't think Harold Cree will ever get a job in the cement business," and I said I don't think so, either.

Q. Did you take any steps whatsoever to prevent Cree from getting any job in the cement business?

A. I did not.

Q. Did you make any effort to help Cree to find a new position?

A. I made several efforts. Several people talked to me about him, asked about him, wrote me letters. I answered the letters the best I could. In some instances where the letters came from someone I knew, I called them on the phone and talked to them about Harold. He tried to get some jobs being a jobber for tile and lime and sewer pipe and fabric, and all those things. I knew a number of those manufacturers, and they called me up.

Q. Did Mr. Cree know of your efforts on his behalf?

A. He knew of some of them.

Q. How do you know?

29942 A. Because he called me up at home once or twice and thanked me for putting in a boost for him.

Q. Has the Aetna Company ever had a sales manager since August 1, 1936?

A. No. We have no sales manager, no one holding that title.

Q. Have you made any efforts to get any sales manager?

A. Yes, I have done a good deal of looking, trying to find somebody that I thought would fill the bill.

29945 Q. Has Miss Fowley worked for the Aetna Company since you came with it?

A. Yes, she worked for it for approximately a year.

Q. Was she a satisfactory employee?

A. She was not.

29948 Q. On record page 836 Miss Fowley testified that she went to considerable expense in moving from Detroit to Bay City when the Aetna Company moved its offices to Bay City.

Is that statement of hers correct, Mr. Calvin, if you know?

A. It is not correct. We paid all of her expenses, moved all of her furniture, sent her up there with a salesman ahead of time to pick out an apartment, and when she finally moved up paid her expenses at the hotel for a couple or three days until she finally got located, moved in, settled.

29949 The witness identified Resp. Ex. 1968-A to M as photostatic copies of the records of Aetna; Resp. Ex. 1969 A as a letter he wrote to Mr. Johnson. The witness' signature is on the letter and Mr. Johnson's
29950 handwriting appears thereon; Resp. Ex. 1969 B through E as photostats of records of Aetna.

29952 (RESP. EXS. 1968-A to 1968-M, and 1969-A to 1969-E were offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Calvin, you testified that Miss Fowley was not a satisfactory employee. Would you tell us how she was unsatisfactory?

A. May I ask, is the answer that I partially gave off the record, or shall I repeat that, or what?

29953 Q. That has been stricken from the record.

Trial Examiner Norwood: You testified, it is in the evidence, that appears now; I had overlooked it a while ago, that that witness was discharged, and that you discharged her. Now, you may give us your reasons for discharging her as tersely as you can.

A. She was a poor stenographer, very poor at taking dictation, did not transcribe it, did not write letters the way you dictated them; then, she had an attitude that she knew more about the business than I did, and knew more how to write letters than I knew.

By Mr. Withrow:

Q. Miss Fowley testified that she was invaluable to the Aetna Company because of the information she gave you concerning the operation of the company. Would you tell us whether or not you found her so.

A. Most of the information that she put out was gossip and mean remarks about other people in the company.

Q. On record page 836 and 837 Miss Fowley testified as to why she left the Aetna Company. Were you familiar with that testimony, Mr. Calvin?

A. Oh, I have read it over two or three times.

Q. She states here on page 837, "I told him on the 11th of August that I wanted to quit and he asked me to stay until the first of September to help break in another girl."

29954 It goes on at some length. Would you tell us what were the facts surrounding her discharge?

A. Well, it was a somewhat of a drawn-out proposition. She complained about working up there from almost the first time that she got to Bay City; she did not like it, and she did not seem to be getting on with the other employees, and, specifically, about early in August Mr. Johnson came out, and he had not met a number of employees there in the office, and we had a little dinner, and they came by our house before dinner and had a few cocktails, and she drank quite a few, and made quite a show out of herself to Mr. Johnson, and a couple of days afterwards she came in and said she wanted to give up her job, so that suited me real fine, and I said that is all right, we will get somebody else right away.

Q. What arrangement did the Aetna Company make with Miss Fowley at the time of her resignation?

A. I paid her for the rest of August, and all of September, and canceled a hundred dollars that she owed us and gave her a letter of recommendation.

Q. Where is the Aetna Company incorporated?

A. Maine.

Q. When was the company organized?

A. I think about 1908.

29957 Q. Do any of your competitors have offices in Bay City, Mr. Calvin?

A. They do not.

Q. And you testified that you moved your office because you wanted to save money. Was there any particular reason in 1937 why you wanted to save money?

A. I made the decision to move up there along in the fall of 1936, and the company had been losing a great deal of money and I wanted to turn those losses around and make a profit.

Trial Examiner Norwood: You would cut out the expense, then, of the Detroit office?

The Witness: Yes, and that was quite an expensive office, too.

By Mr. Withrow:

Q. I believe there is some testimony to the effect that the Aetna Company has two mills, one at Bay City and the other at Fenton, Mich.; is that correct?

29958 The actual productive capacity of the Bay City plant is approximately 1,100,000 barrels in a full year's run. The actual capacity of the Fenton plant is around 700,000 barrels. We do not operate both of these mills at the present time. We operate only the Bay City mill, because we can make all the cement that we can sell right at Bay City, and it is cheaper to make it there than it is at Fenton. Aetna operates no silos or warehouses.

Q. Do you sell any cement through a distributor?

A. Yes, we sell over in Wisconsin through a distributor; he operates some warehouses.

Q. And what is the name of the distributor?

A. Limestone Products Company.

Q. Is E. P. Smith connected with the Limestone Products Company?

A. He is president of the company.

Q. Now, were you the one that closed the operation of the Fenton plant?

A. Yes.

29959 Q. Did Aetna ever operate any warehouse since you have been with the company?

A. Yes, there were several of them in operation when I came with the company, and they operated for a while after I was there.

Q. At what points were these warehouses located?

A. Cleveland, Toledo, Detroit, Grand Haven,—those were in operation when I came there. They had previously, I think, had one up at Sault Ste. Marie.

Q. Did you have one in Port Huron? Was there one in Port Huron in operation when you came?

A. That was not operated by the company.

Q. Why were these warehouses discontinued by you?

A. Because they were unprofitable, and the cement could be distributed in those markets, direct by truck, much more cheaply than it could be taken there by boat and put in the warehouse.

Q. How did you know this?

A. Because we put some books in there that showed costs. The cost, I think, to Detroit was about 62 cents a barrel by boat, and through the warehouse onto a job. We trucked in there direct for about forty or forty-two cents a barrel and saved around twenty or twent-two cents a barrel.

Q. Did your customers find it more satisfactory from the point of view of the quality of the cement that
29960 you truck direct to the job?

A. We had fewer complaints; when we put cement through that warehouse it had, naturally had to go in in big quantities, and would get warehouse set, get wet, some of the sacks would be broken and re-sacked, and when the workmen re-sacked the cement they were careless and got foreign matter into the sack, like old cigarette stubs, and once in a while a tobacco can, or something like that, and the customers complained, and when we trucked direct from the plant we had no such complaints because the cement was always fresh.

Q. Did you consider the Detroit warehouse the most economical warehouse which you discontinued?

A. It was by far the most economical.

Q. And yet you made a saving of 20 cents a barrel by shipping direct by truck,—about 20 cents?

A. That is right.

29961 The witness identified Resp. Ex. 1971 A to C as a duplicate copy of Aetna's records on three of the warehouse operations. These were prepared, covering the operations of three of the warehouses that he testified about.

Examination by Trial Examiner Norwood.

That is a duplicate of Aetna's records in its accounting department; that is the way the company keeps its books. These are duplicates run off on a ditto machine.

Examination by Mr. Withrow.

That is a duplicate original. The witness identified Resp. Ex. 1972 A and B as a memorandum prepared and signed by him. He further identified Resp. Ex. 1973 A and B as a memorandum prepared by him. The signature is his signature. He further identified Resp. Ex. 1974 as a memorandum prepared by him.

29962 Trial Examiner Norwood: What do you want to show by those?

Mr. Withrow: They are the cost of running these warehouses about which the witness has testified and concerning which the Commission made considerable issue when Mr. Cree and others of their witnesses went on the stand as to the efficiency of operation of those warehouses.

Trial Examiner Norwood: Well, this witness has already testified as to the amount of saving, hasn't he?

Mr. Withrow: Yes, but this will corroborate his testimony and will show why he discontinued them as well as explain that, and show the actual facts and figures which corroborate this witness' testimony, or are directly contrary to the testimony already adduced on behalf of Counsel for the Commission. These documents, of course, go much further than the witness' oral testimony. We could get all of that information in by oral testimony but it would take a half hour or maybe even longer to go into it. One of them is three pages of figures. It is a consolidation. It is what Counsel for the Commission has been asking for, I think.

Mr. MacIntyre: May we ask Mr. Calvin some questions on the voir dire examination?

29963 Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Calvin, referring to Respondents' Exhibit, for identification, 1971-A, B, and C, the items appearing thereon on the line opposite the term "Total Gross Sales on a

per barrel basis of $1.5873," can you tell us where that came from and who put it on this sheet?

A. My accountant put it on there.

Q. Where did he get it?

A. He computed it from our invoice records. It is accounting procedure that produces this.

Q. What kind of invoice records did he compute that from?

A. Well, he would have to take the invoice to see the price we sold it for.

Q. Well, now, I will ask you one further question: Opposite the item "Cost of sales," the item "Bin Cost," the per barrel cost figure of .8351, where did that come from?

Mr. Withrow: Could I have that question read, if Your Honor please?

Trial Examiner Norwood: Read the question.

(Question read.)

A. You got three, you got four different figures there, haven't you?

By Mr. MacIntyre:

29964 Q. Well, I am asking now about the .8351.

A. The accountants probably computed that.

Q. From what?

A. From the figures they got in their books.

Q. Computed from certain other records in the office of your company?

A. I think so.

Q. Would you say the same thing with respect to the item below that, $1.0000?

A. No, those could not have been.

Q. Where did they come from?

A. Those are arbitrary figures used.

Q. Who selected them and from what source?

A. Mr. Tripp and I probably arrived at that figure.

Q. Mr. who?

A. Our auditor, Mr. Tripp.

Q. You and he arrived at it?

A. Probably so.

Q. How?

A. Well, these were for the first year—these were for the year after closing that warehouse, and we discontinued the manufacture of both mortar and high early at Fenton, where the costs had been simply prohibitive, and because

they were so high; when we had closed our books at the end of the year we wrote down some of those figures to
29965 an arbitrary one, to what we thought was something near what the cement ought to appear at in our inventory for another year. In other words, when they had some costs so far out of line I did not want to carry in the inventory into a new year a product that was out of line, a price that was out of line, and this mortar figure came about that way, and the high early strength probably the same way.

Q. In other words, it is not based on any actual figures of the company; it is a computation arbitrarily arrived by you, and, what is his name, Tripp?

A. Those two items probably are, but there was so little mortar and high early involved, it is insignificant, 10 barrels of mortar in a whole year, Mister.

Q. Well, some of that is considerable, that second one, a thousand barrels, the third one 670 barrels.

A. Another very insignificant figure, 670 barrels a year.

Q. But the first one up there is 41,000, isn't it?

A. That is right.

Q. What about the figures appearing on the second sheet; that is, B, opposite "Cost of Sales," in the item "Bin Cost," for gray, waterproof mortar, and high early, and so on, where did they come from?

A. They are duplicates of the others.

Q. That is for Grand Haven, and this is for Detroit, the figures are different, at the bottom of page. Do you
29966 say the same about those as you do about the figures in the same place on the preceding sheet; that is, that they were arrived at in the same way?

A. They are duplicate figures.

Q. In other words, they are for different warehouses but you just took the same figure and put them on the sheet?

A. Mister, this cement was made in our manufacturing plant and transferred over to that warehouse, and that is the inventory, what the cement was worth; it does not make any difference what it costs us, whether in Grand Haven, Detroit, Toledo, or Cleveland, or Sault Ste. Marie, you are talking about the same kind of cement.

Q. But as to the arbitrary character of the figure, you say you and your auditor just selected that arbitrarily and put it on these sheets?

A. These two figures, I said.

Q. That goes for them as they appear on the first and the third sheet, does it, or, rather, on the first and second and the third sheets, does it?

A. Just a minute. It does for those from there down.

Q. On all three sheets?

A. I do not think they are on the third sheet, are they?

Q. They appear to be.

A. I missed them. Where are they?

Q. Opposite the item "Bin Costs, Gray Waterproof mortar."

29967 A. They are different here.

Q. $1.0000, they appear to be the same.

A. No, sir. I beg your pardon. .8351, .8369.

Q. I am talking about the waterproof gray mortar and high early.

A. They are all arbitrary.

Q. You put them on the sheet in the same manner, the same way, arbitrarily; that is, you and your auditor?

A. As far as I know at this time, that is right.

Q. Can you say now with certainty, Mr. Calvin, that there are no other figures on those three sheets that were not arrived at in the same manner that you arrived at those, you and your auditor?

A. Now, if you will look at the top of that sheet you will see it says second closing adjusted.

Q. What does that mean?

A. I think usually when these certified public accountants go over your books for a couple of weeks or a month or two, that they all do some adjusting, adjust inventories here and there, at least they have in my place.

Q. You and Mr. Tripp then—

A. No.

Q. —adjusted to your satisfaction these figures as you placed them in there?

A. Probably the most of this adjusting is done
29968 by your outside auditors. An item like what might be a fair figure to set up a mortar inventory at, or a little high early cement. You see the figures are insignificant; all three of us, that is Tripp and myself and the auditor might have talked it over, and I said, "Call it a dollar, for goodness sake."

Q. But it was important enough to include in the sheets.

A. Well, that auditor I have got will include everything in the world in the sheet. He won't leave anything out.

Q. Here is an item opposite that 1999 a barrel; is that, in your opinion, important or unimportant?

A. That is important, 1096 barrels.

Q. You got that in there at a dollar.

A. Yes, that has some importance.

Q. And that is the same figure, and you arrived at it the same as the others?

A. But here, you see here is an explanation. I discontinued the manufacture of high early strength at Fenton, when we moved it up to Bay City. Now, you had some cement coming to this warehouse from Bay City, some from Fenton, left over, and there are figures somewhere in there consisting of averages that we used for accounting purposes there to close the books up at the end of the year.

Q. You and Mr. Tripp just averaged them and took the averages?

A. Well, on those, Arthur Anderson & Company, 29969 our public auditors, might have helped. It has been, what is it, three years; it is a little item, 10 barrels. I do not know what all we did.

Q. It is dated April 8, 1938.

A. Well, two years ago.

Q. Well, now, under the item insurance and taxes, what can you tell us where that figure came from, .0052, Mr. Calvin?

A. Probably it came out of the books as the insurance and taxes on that particular warehouse.

Q. Prorated as to barrels, or how, do you know exactly how your auditor did that?

A. Well, you have two amounts, you have got a lump sum and you have got it divided into barrels.

Q. Do you testify that that is the way he did that?

A. Yes, sir.

Q. Do you know it?

A. Yes, sir.

Q. Of your own knowledge?

A. That is right.

Q. You did not do it yourself?

A. No, sir.

Q. What about salaries,—how much of your salary is included opposite the word "Salaries," in .3069?

A. My salary?

Q. Yes.

29970 A. I do not work for the warehouse. That is the

salary of the warehouse help; probably the foreman I had down there.

Q. You did not participate in the administration of the warehouse at all?

A. Yes, but my salary would be charged against general administrative expenses from the home office, and this is the salary of that warehouse down there, permanent employees with the one man in charge of that warehouse, and probably some other help on a permanent basis that we paid salaries to.

Mr. MacIntyre: If Your Honor please, we object to Respondents' Exhibit 1971-A, B, and C, which is submitted here as a statement of sales and costs of sales including plants and warehouses and opposite the item of cost of sales, the bin cost for gray waterproof mortar and high early, the witness has already testified that he and some other people in the company just arbitrarily selected the figures and set them down for those sheets, and, of course, the figure as to a loss at the end is determined in part by the figures that appear above, sums selected arbitrarily by this witness and others in the company, not the actual record figures of the company but something arbitrarily selected.

We can see in the future Respondents' Counsel arguing that that loss figure at the end is something actually sustained. How do we know? It is based on arbitrarily
29971 selected figures by the auditor and the witness. We do not think that it is a correct statement of the cost of operations on the basis of what the witness has testified to on voir dire, because from his testimony it appears to be unreliable.

Mr. Withrow: Could I ask the witness one question?

Trial Examiner Norwood: Certainly.

Direct Examination by Mr. Withrow (Continued).

Q. With reference to the figures on those, that exhibit, Mr. Calvin, are there any figures on it concerning the cost of operating the warehouse which are arbitrary, or are they the actual cost?

A. They are actual costs.

Q. Are there any figures other than the figures Mr. MacIntyre referred to, the combined cost for waterproof or for mortar and high early strength which are estimated costs or written down costs?

A. There are not.

Q. And as to those estimates which Mr. MacIntyre pointed to, were those estimates made in the regular course of business at the time, to-wit in March or April of 1938?

A. They were.

Mr. MacIntyre: If Your Honor please, we add to our objections those that such portions of the informa-
29972 tion as contained on these sheets which the witness testifies are accurately reflected records of the company, we have no way of meeting in questioning him on cross-examination, because Counsel for the Respondents have not submitted to us the underlying data for our use in cross-examination. We do not feel that under the circumstances the offer is competent, relevant, or material.

For all the reasons that I have advanced we object.

Mr. Withrow: Well, Your Honor, with reference to Mr. MacIntyre's last objection, in offering this I perhaps should have stated that I relied upon the stipulation entered into by and between Counsel for the Commission and Counsel for certain Respondents appearing at record page 1613 through 15, and following, which Mr. Wooden this morning specifically said he had no intention of repudiating; that is clearly within the stipulation.

Mr. MacIntyre: Your Honor please, we would not be repudiating.

Mr. Withrow: This would be admissible in any event; this is the actual record of the company and this witness vouches for it.

Mr. MacIntyre: If Your Honor please, we have not repudiated any stipulation or attempted to withdraw any that we have ever entered into in this case. We stand by them.

We intend to stand by what appears in record 1613,
29973 but we intend to observe each and every provision of it, and we do not feel that this one falls within it, and we ask you to read that stipulation in connection with this offer before considering that it does so fall within it.

Trial Examiner Norwood: Doesn't that stipulation provide for the data on these tabulations to be made available to the other side?

Mr. MacIntyre: We consider that it does, and we ask Your Honor to consider it in connection with the offer.

Mr. Withrow: Your Honor, the stipulation itself specifically says: "Without the production of the original data in the circumstances where the witness vouch for the ac-

curacy." And in this case this document was prepared in the ordinary course of business.

Trial Examiner Norwood: I think that was with regard to the data tabulated from material that is already in evidence, wasn't it?

Mr. Withrow: No, Your Honor. Your Honor, the stipulation does not so state, and it has been used a great number of times for many and various purposes. But this evidence does not even need the stipulation, as a matter of fact; it is receivable as the original entries made in the ordinary course of business.

Trial Examiner Norwood: This witness testified to certain savings being made as a result of his dis-
29974 continuing certain warehouses, and he is putting this in to corroborate that.

Mr. Withrow: And it goes further, if you read the witness' statement.

Trial Examiner Norwood: But these are not figures of the witness, and he cannot testify to their correctness, or be cross-examined on them.

Mr. Withrow: He can testify to their correctness. Counsel for the Commission has been cross-examining as to where the figures came from, and all about them.

Mr. MacIntyre: Those that I have examined him on voir dire he stated that he estimated and arbitrarily put in there. There are others that he did not so select. Somebody else selected those from the books. I do not see how he can vouch for those.

Mr. Paulson: I do not see how it is in issue what the warehouses cost the company or did not cost the company. Mr. Lingeman was the manager of the company. Whether or not the warehouses are the most profitable way to distribute cement does not even appear to be in issue at all. The question is was Harold Cree dismissed as a result of concert and collusion on the part of the competitors, and this does not go into that issue. It might go to the issue of why Lingeman was dismissed, or it might go to the issue if Lingeman was a good manager.

29975 Mr. Leisure: This seems to be one of those cases that Counsel should agree we should take out of the record, and we would not need to spend time on it. We are only meeting evidence put in by the Commission in this particular instance, Mr. Cree, himself, testified with respect to these very warehouses and their cost of operation.

Trial Examiner Norwood: Yes. He testified as to savings there, and the claim of the Commission is, in spite of the fact that they were selling it cheaper by the use of the warehouse, that they were operating cheaper by that, that they did away with the warehouses in order to maintain the price.

Mr. Leisure: That is right.

Mr. Paulson: I do not recall anything along that line in our case.

Trial Examiner Norwood: It becomes relevant as to whether or not that is the actual fact, as to whether there was a saving in doing away with the warehouses, or whether the warehouses were done away in order to maintain the identical prices.

Mr. Paulson: We say if they were done away with whether they were a losing proposition or a profitable proposition, they were done away with by agreement. We say that that does not bring in—I think we said that; 29976 that is as far as I recall—that does not make this relevant.

Trial Examiner Norwood: Now, here are some figures here that would seem to uphold the contention that the warehouses were done away with for purposes of economy.

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: Now, the only question is, are these figures—if this witness has a right to put them in here, since he was the one who discontinued the warehouses. He was the one who collected the information through his subordinates and made the decisions to discontinue them.

Mr. Paulson: Yes, but isn't it just as probable that they would do away with some method of sales that was disrupting the regular and systematic method of sales as it is to eliminate the thing on the basis of cost? That is what occurred up there, according to the facts. Harold Cree started the line of warehouses there. He probably was mistaken in his judgment, but he did start a line of warehouses and used that method to cut prices. That is the testimony. And the other companies had to meet him, and they got to the end of their rope, and they simply said—I am trying to recite the testimony—they simply agreed to force Harold Cree out. Now, whether or not they are losing propositions we are not concerned with, and they are

not in issue here. We did not care whether they
29977 were losing or profitable, but they all exerted pressure on that.

Mr. MacIntyre: And, as a further point—

Mr. Withrow: And they talked about the question why this witness discontinued the warehouses. Mr. Paulson's statement does not change that at all.

Trial Examiner Norwood: The only question I am considering now is whether or not it is fair to receive this portion of the story without having the whole story available.

Mr. MacIntyre: I think that is rather vital.

Trial Examiner Norwood: Here are some figures taken from part of the records that the Aetna Company has. Now, is it fair to take part of the story without taking it all?

Mr. Withrow: These are the records of those warehouses, Your Honor. That is the record.

Trial Examiner Norwood: That is the whole record?

Mr. Withrow: Of those warehouses, yes.

Mr. MacIntyre: Now, if Your Honor please, let us look at them for just a minute and see whether that is a correct statement. They are for a month. Even if they are correct even for that month,—and, of course, they are for the month of April—

Mr. Withrow: Would you ask the witness? Would
29978 you ask what that record is for?

Mr. MacIntyre: You have laid no foundation what period it is for.

Trial Examiner Norwood: I think we have discussed this enough. If you will give me just one or two facts, I will be able to rule on it.

(Addressing the witness:) Are these just for one month?

The Witness: Will you let me have them for a minute?

(The Examiner hands documents to the witness.)

The Witness: That is for the entire fiscal year, that closes April 30, 1938.

Trial Examiner Norwood: Is this all of that proffer? There are some statements there.

Mr. MacIntyre: No. I am coming to those.

Trial Examiner Norwood: State your objections to those.

Mr. MacIntyre: We cannot insist too much that the offer

that we have already objected to is irrelevant and immaterial, and, furthermore, it is incompetent. It goes to a period of operation entirely under the administration of this witness.

Now, as to whether he made the cost so great for the warehouses that they could not make money, that
29979 they would even lose $3 a barrel, might even be another question. That goes to the point of the relevancy, and that was just raised by Mr. Paulson. They may be made arbitrarily, up, down, or any way; make money, lose money, or anything else. Naturally, you can do that. So why are they reliable?

Now, as to Respondents' Exhibits 1972-A and B, 1973-A and B, and 1974, we object on the ground that they carry a lot of purporting to be factual statements over the signature of this witness. It seems to me that it is—to go back to the back door or basement door phrase again, of getting in evidence. The witness can be asked about those if they are relevant and material. We do not even believe they are relevant and material, in the first place, and certainly incompetent in that form.

Trial Examiner Norwood (Addressing the witness): Now, Mr. Calvin, when were these warehouses discontinued?

The Witness: Different ones at different times.

Trial Examiner Norwood: Yes.

The Witness: As near as I can recall, we closed Cleveland in the fall of '36.

Toledo had a little cement left in, and they got into the tail end. They got probably into '37. During the summer of 1937 that warehouse was cleaned up.

I think the last cement was put in to Detroit dur-
29980 ing the summer of '37. I think I got out of that along in about November of 1937.

And I think that Grand Haven was closed some time that same summer.

I remember I had in mind getting from underneath those warehouses as fast as I could, and at least get them cleaned up at the end of the fiscal year, which ended April 30, 1938. So those records may have been a month, or six months.

Trial Examiner Norwood: Would you have any figures showing the relative costs prior to the time you took charge?

The Witness: Mr. Examiner, those books they had were just a mess. They had no cost of anything. They had no idea of cost of a warehouse or anything else. We put a set of books out. That is what they showed. That closed it up.

Trial Examiner Norwood: Now, this gives you information of those warehouses from the time you took charge to the time you closed them up, does it?

The Witness: No. That would only start—that statement would start May 1, '37, to April 30, 1938, and I started with the company August, '36, so there is a statement behind that one.

Trial Examiner Norwood: What did they do the 29981 two years previous to that time?

The Witness: Well, two years previous would include Cree's administration.

Trial Examiner Norwood: You came in '36, didn't you?

The Witness: '36, and the year would end April 30, 1937.

Trial Examiner Norwood: Yes.

The Witness: I could tell you part of it.

Trial Examiner Norwood: Well, you had experience prior to the time covered by these statements.

The Witness: Pardon me. We had about eight or nine or ten months. That is right.

Trial Examiner Norwood: What about those? What did you know about that?

The Witness: Well, I put in a new set of books starting January 1, 1937.

You see, O'Neil stayed with us until December. I let him go. I hired a new auditor, new personnel, a new set of books, took two or three months to get the old mess straightened out and the new books working; and actually the end of the fiscal year is the first year that our books really worked during that whole year.

Trial Examiner Norwood: I think that you may put in these figures and let the Government analyze them. 29982 and I shall overrule the objections as to Respondents' Exhibits 1971-A to C.

Now, the other papers of the proffer, consisting of written statements signed by the witness, who is now on the stand—

Mr. Withrow: They are reports made in the regular course of business.

Trial Examiner Norwood: Yes. —are rejected.

1971-A to C is received, and the others are rejected.

(RESP. EX. 1971-A, 1971-B, and 1971-C was offered and received in evidence.)

Trial Examiner Norwood: Inasmuch as they are rejected, you will have to bring out the matter by oral testimony.

Mr. Paulson: To be observed in connection with that offer, they have just made there, that Counsel for Respondents seem to feel willing to rely on signed statements of their witnesses as to certain matters, but as to the matters which we propose that they submit signed statements of them are not willing to rely. Those are nothing more or less than signed statements as to certain testimony, that this witness should more probably give on the stand.

29983 Mr. Withrow: Your Honor, that is not—

Trial Examiner Norwood: They have the privilege which signed statements they are willing to rely on and which signed statements they are not willing to rely on.

Mr. Withrow: These were made in the regular course of business, and on the voir dire examination on one simple small tabulation Mr. MacIntyre took over a half hour. I think that would show how much time would be saved.

Trial Examiner Norwood: Let us not discuss the matter of saving time. Let us proceed with the matter in hand.

By Mr. Withrow:

Q. Mr. Calvin, did you make a report to Mr. Johnson on the Grand Haven warehouse in December, 1936?

A. I reported to him about those warehouses from time to time.

Q. Is Respondents' Exhibit 1972-A and B the report you made on the Grand Haven warehouse?

A. Yes, I made that report.

29984 Q. Mr. Calvin, when you made that report to Mr. Johnson in December, 1936, did you report the facts as you knew them at that time?

A. Yes, I did.

29985 Q. Can you tell us without looking at the document what you reported to Mr. Johnson in December, 1936, about the Grand Haven warehouse? If you cannot, you can look at Respondents' Exhibit 1972 to refresh your recollection.

Trial Examiner Norwood (Addressing the witness): What are those facts? Tell us.

Mr. Withrow: And if you have to look at Respondents' Exhibit 1972 to refresh your recollection, go ahead.

The Witness: The facts are that the warehouses over there continually lost money; that I found the in-
29986 ventory was about 2,500 or 3,000 barrels short; that the person who had been operating the warehouse had not reported to us all the sales that they had made, and as a consequence not all the money that the company was entitled to collect; that we had a lot of trouble in storing cement in the warehouse, because it moved so slowly that it became warehouse set; that the man who was operating the warehouse, Mr. Robins, was not making any money out of it, and he was sick of it. The whole thing was just a poor business proposition, and I closed it up as quickly as I could.

By Mr. Withrow:

Q. Mr. Calvin, did you report on the Sault Sand & Gravel Company account of warehouse to Mr. Bolster in September, 1937?

A. Yes; I wrote Mr. Bolster about that situation.

Q. Will you tell us what the facts were about that situation, if you recall?

A. Well, when I went with the company I found that the people at the Sault Sand & Gravel Company owed us considerable money, I think three or four thousand dollars. I went up and had a talk with them personally, and found that it operated a warehouse for a while, that they were taking a severe loss on it; and although legally they probably owed us this money, they tried to make out a case that we ought to not try to collect it, or ought to stand part of it, or something of that nature.

The warehouse had been closed up, and they claimed
29987 that it did not work the way Cree represented it would. He said they could sell a great deal of cement. Nothing worked out the way Cree told them. The cement hardened and they couldn't sell it. They had trouble with it, they took a loss, and all that. So I tried to collect the money, and I wouldn't collect it. Finally I wrote part of it off the books.

Q. Now, Mr. Calvin, did you report in January, 1937, to Mr. Johnson on the Saginaw warehouse?

A. Yes; I wrote him then, told him we closed up that warehouse, got underneath that one.

Q. What were the facts about the closing of that warehouse?

A. Well, the Saginaw warehouse was 12 miles from our plant, having anywhere from fifty to two thousand barrels. To me it seemed ridiculous to have a warehouse 12 miles from your main source of manufacture. And the man who was operating that was dissatisfied; he could not make any money out of it. It cost a lot of money. The idea of taking cement and pulling it a little more than 12 miles and putting it in the warehouse and trucking it from the warehouse, instead of straight from the plant, is just absurd.

29988 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Referring to Respondents' Exhibit, for identification, 1975, can you tell me, Mr. Calvin, when you first saw that?

A. These are figures—

Q. I am talking about the document. When did you first see the document?

A. This document—just now.

Q. When?

A. Just now.

Q. Well, what do you mean by just now?

A. When he handed it to me.

Q. In other words, you had never seen it before you were handed it here in the courtroom?

A. Not this exact sheet.

29989 Q. That is, this document which contains information, is what I am talking about now. You had not seen it before it was handed to you here in the courtroom?

A. Not that I recall.

Q. And what was your identification of it? I did not quite hear all of it.

A. Oh—

Q. That you gave in response to his questions. How did you identify it?

Mr. Withrow: Read the question and the answer where he identified it. It will save some time.

Trial Examiner Norwood: Read the question and the answer.

(The record was read as follows:

"Q. Mr. Calvin, I show you Respondents' Exhibit 1975, for identification, and ask you if those are figures prepared in your office.

"A. Yes, they were.")

By Mr. MacIntyre:

Q. Now, in the light of the testimony you have given, how can you say, if you have not seen that document before a moment ago, that it was prepared in your office and under your direction?

A. I don't think I testified under my direction.

I can testify this, that these are the trucking
29990 figures, the cost of trucking cement from Bay City to these points. That is a going rate that we have been using.

Q. In other words, the document, Respondents' Exhibit, for identification, 1975, carries a statement of the correct rates, trucking rates, between the points shown.

A. That is right.

29993

Washington, D. C.,
January 10, 1940.

30002 (COM. EX. 3239-A to 3239-F was offered and received in evidence.)

(RESP. EX. 1963-A to 1963-H was offered and received in evidence.)

30009 BENJAMIN W. CALVIN thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Withrow.

Q. Mr. Calvin, when we adjourned yesterday
30010 afternoon we were discussing these warehouses of the Aetna Company which you discontinued. Would you tell us whether or not you discontinued any of these warehouses as a result of any agreement with your competitors?

A. I did not.

Q. Did you discontinue any of them as the result of any pressure from your competitors?

A. No.

Q. Was it at your competitors' suggestion?

A. No.

Q. Now at record pages 505 through 507 Mr. Cree testified that he had 2½ salesmen; when you arrived with the Aetna Company how many salesmen did you find employed by the company?

A. He had four men traveling trying to sell cement.

Q. And on record page 839 Miss Fowley testified that Aetna's sales force was increased in 1936, that is the first year when you were with the company, from three salesmen to ten salesmen; is that correct?

A. That is incorrect.

Q. Would you tell us what the facts are?

A. The fact is that I took one of the salesmen that Cree had on the road and who had been an old plant employee in the office, mill office, that they had put on the road, I put him back in the office and I hired one more sales-
30011 man that calendar year, that is, 1936; and then I put on some more through the winter, and in the spring until I got up to a total of nine, which is what we have today.

Q. Now, on record page 863 Miss Fowley testified that it was not necessary for you to put on additional salesmen, especially during the late season in 1936. Would you tell us why you put on one extra salesman in 1936 and the others in the beginning of 1937?

A. Well, the whole idea in putting on salesmen was to merchandise cement so we could make a profit out of it. Now, you cannot expect any salesman to sell cement—that is, just go out on the road and start selling the first day or the first week. He has got to learn something about the cement business; he has got to learn the territory, learn the customers, get acquainted with contractors, and the quicker you get them out there and start them getting acquainted the better off you are and the sooner they will begin to sell cement. So just because it was winter time that we hired some of these salesmen is no proof that it was not the right time to put them on. The fact of the matter is if you do not have your salesmen out at this time of the year, January, February, March, building up business for the future, you won't ship any cement in

April, May, or June. You always sell ahead, more or less.

Q. Well, did you get any dealer accounts as a result of hiring these additional salesmen?

30012 A. Yes, we got a great many new dealers.

Q. And about how much cement has been sold to these new accounts?

A. I could not tell you up to date. I remember I checked the first year; I think I wrote Mr. Johnson a letter; it seems to me the new accounts we put on in 1937 brought in about 100,000 barrels extra business.

Q. Now, did you put these salesmen on as a result of any agreement with your competitors that you would do so?

A. No.

Q. Do you think these additions were justified?

A. I think our sales record proves it was.

Q. How many dealer accounts did the Aetna Company have at the time you became associated with the company?

A. As near as I could determine by checking through the customers' ledger, they had approximately 300 accounts when I came with the company.

Q. Now, Miss Fowley testified, at record page 839, that your sales activities did not result in any increase in the amount of business; is that correct?

A. That is not correct.

Q. Would you tell us what the facts are?

A. Well, as to new accounts I think those salesmen, the first of the year, put out about 150 new accounts. We always lose some accounts every year; people go out of business, credit is bad, or something like that: I

30013 think our net gain the first year was about 111 accounts, and we had increased the number of our dealers every year since then, and I checked late in 1939, and the number we had sold so far that year was 524 dealers.

Q. That is an increase of 220 for active accounts?

A. Approximately.

Q. How did your shipments, the shipments, compare in the first year at Aetna with the shipments that had apparently been made the preceding year?

A. Well, roughly speaking, during Cree's last year, the company sold about 635,000 barrels shipped.

30014 Q. On record page 839 to 841, inclusive, Miss

Fowley testified that the Aetna Company lost business after Cree's discharge. Is that correct?

A. There is always a change in customers.

30015 Trial Examiner Norwood: Well, now, give a direct answer to that. Did it lose it or did it not?

The Witness: The net result was that we gained business.

By Mr. Withrow:

Q. Now, on record pages 840 and 841, Miss Fowley testified that you lost Jerry Utley, Aetna's largest buyer, as a customer. Have you sold Mr. Utley since you have been with the Aetna Company?

A. Yes. We sell him often. We shipped him, I recall, as late as November and December of 1939.

Q. Mr. Calvin, is Renee Payne alive?

A. He is not.

Q. When did he die?

A. He died before I came with the company.

Q. Is F. R. Johnson still alive?

A. No. He died last summer, July.

Q. Is O. J. Lingeman still living?

A. He died in October of 1938, I think it was.

Q. Now, Mr. Calvin, in what territory does the Aetna Company now market its cement?

A. Michigan, northwestern Ohio, northern Indiana, eastern part of Wisconsin.

Q. Who determines the extent of your marketing area?

A. I do.

30016 Q. And what is the determining factor?

A. Competition and what I think is a chance to make a profit.

Q. Have you ever agreed with any of your competitors to allocate the business or allocate the territory in which you do business?

A. No, I have not.

Q. Now, what companies do you come in competition with in the State of Michigan?

A. Huron, Peerless, Wolverine, Consolidated, Petoskey, Medusa, Universal, Wabash, Miami.

Q. You haven't mentioned the Ford Company. Do you come in competition—

A. Oh, yes, Ford, they are competitors; plant in Detroit.

Q. And in Ohio and Indiana who do you come in competition with in addition to the ones you have mentioned?

A. Columbia, Diamond, Kosmos, Speed, Alpha,—they are in Michigan, too.

Q. Bessemer?

A. Yes, Bessemer is over there in the eastern part. We do not hit them so much.

Q. And what companies in addition to some of these do you come in competition with in Wisconsin?

A. Lehigh, Dewey, Manitowoc, Marquette,—those
30017 are the prominent additions. There might be one or two others get in there that I do not think of.

Q. How do you determine the prices at which you sell cement?

A. Generally speaking, I arrive at a price by a combination of a mill price plus freight rate and then you are influenced by competitive conditions in a market, to try to find out what the price is, what competitors are quoting in a market: we try to be competitive.

30018 By Mr. Withrow:

Q. What price do you have to meet in any given market place, Mr. Calvin?

A. If you want to sell cement you have to meet the lowest price.

Q. And what company do you find makes the lowest price in the markets where you sell cement,—is it any one company?

A. Not always. There are certain ones that might probably make them more often than others. The Huron is a very dominant factor in our trade territory.

Q. Do you sell generally at delivered prices?

A. Yes.

Q. Now, you testified just a moment ago that you attempted to follow the price quoted by your competitors. Will you just tell us briefly or outline the method in which you get that information?

A. It is usually sent in by the salesmen or the customers call up on the phone. You arrive at it by discussions with prospective purchasers.

Q. Now, in following delivered prices, do you check in the field at every point where you sell and deliver cement?

A. No.

Q. Why don't you?

30019 A. Well, you can check over a territory and bring out the facts as a practical proposition about where the market level is. It is not necessary to go into every cross-road town to figure about where the market is.

Trial Examiner Norwood: When you find the prices at a few key points, do you know what the price will be at the others?

The Witness: Well, you would have to go over the territory pretty well on that word "key point" to establish the whole level. Then you figure what you think the price is at the other points.

By Mr. Withrow:

Q. Has it been your practice, Mr. Calvin, since you have been with the Aetna Company, to require your salesmen to send in reports and copies of quotations which have been picked up in the field?

A. Yes.

30021 *Examination on Voir Dire by Mr. MacIntyre.*

Q. These writings, Respondents' Exhibits 1976 and 1977, are they in response to some communications that you got from men to whom they are addressed?

A. No. Those are sales instructions that I am trying to train those salesmen to conduct themselves in the manner in which I think is best.

Q. They have no connection with any information that you secured from them or other sources?

A. Well, that is just a general instruction to salesmen telling them what I want them to do when they are out there working for us.

Q. I am asking you a question. Will you please read the question to him, Mr. Reporter?

Trial Examiner Norwood: Read it.

(Question read.)

A. Well, just at this time, 12-30-36, there were a great many quotations lying around in the field, and I specifically wanted them to send some in, and I wanted also to

30022 train these salesmen so in the future I would not have to tell them any time what they are supposed to do.

Trial Examiner Norwood: Let me see them.

By Mr. MacIntyre:

Q That still does not answer the question I asked,—whether they have any connection with any other documents or any other information you had at the time. Can you answer that, Mr. Calvin?

Mr. Withrow: Your Honor, I object to the question. It is not proper voir dire; perhaps it is proper cross-examination. If Mr. MacIntyre has something specific in mind he can ask the question.

Trial Examiner Norwood: The objection is overruled.

By Mr. MacIntyre:

Q. Please answer that, Mr. Calvin.

A. I do not recollect.

Q. You do not recall whether they have any other connection?

A. No.

Mr. MacIntyre: If Your Honor please, we object to the offers.

Trial Examiner Norwood: The objection is sustained.

Direct Examination by Mr. Withrow (Continued)

Q. Do you still maintain your distributorship through the Limestone Products Company?

30023 A. Yes, in the State of Wisconsin.

Q. Do you have them pick up and send in quotations which they find in the field?

A. I do.

30027 Q. Do you ever issue quotations of Aetna's announced prices?

A. Yes.

Q. Under what circumstances?

30028 A. Well, we have always broadcast if there is any price change in the market, and sometimes just quote the trade generally.

Q. Do you enter into specific sales contracts with your customers?

A. Yes, we do.

Q. Now, how do your salesmen, when they are in the field, quote prices?

A. I give them a list of prices to all of the towns in their territory, and they use those prices in their territory.

Q. That is prepared in your office?

A. That is.

30029 The witness identified Resp. Ex. 1980 as a quotation used by Aetna; Resp. Ex. 1981 as a contract
30030 form used by Aetna; Resp. Ex. 1982 as a price list used by Aetna.

Examination on Voir Dire by Mr. MacIntyre:

Q. As to 1980 and 1981, when were these forms used by your company, Mr. Calvin? It does not appear on the form.

A. Those are used currently. We still use some to date.

Q. Since what date?

A. I couldn't say since; I could say during the time that I have been with the Aetna Cement Company, and whether they were used previously to that I don't know. I don't think this one was.

Q. 1981?

A. Let me see just a minute.

(After examining the document) I don't know whether this is the form that I had prepared after I came with the company or not, or whether it is one that they were
30031 using when I came with the company.

Q. You do not know when it came into use?

A. All I know is that we are using this form.

Trial Examiner Norwood: Did you use it when you came with the company?

The Witness: I can't tell whether this is one we were using then, or whether I had an additional supply printed at that time that varied slightly from the old ones. I don't know.

By Mr. MacIntyre:

Q. But you are not certain whether it was in use when you came with the company?

A. This exact form might not have been.

Q. Well, what about 1980? Was it in use when you came with the company?

A. Yes; this was in use when I came with the company.

Q. You do not know how long it was used?

A. No.

Mr. MacIntyre: If Your Honor please, we offer no objection as to 1980-A and B.

Trial Examiner Norwood: What about the price list?

Mr. MacIntyre: As to 1981-A and B, we do object, because it is apparently offered to show the terms and conditions used by the company, and yet we have no representations from the Counsel as to what period of time
30032 it was used by the company, and the witness cannot tell us.

Mr. Withrow: It is used today, Your Honor.

Mr. Leisure: It is used today. The witness said they are using it now.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: So we object to it, since the time is not fixed.

Trial Examiner Norwood: Go ahead.

As to 1982, I would like to ask the witness a further question about that.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. When was this document, 1982-A, B, and C, prepared, Mr. Calvin?

A. It says April 26, 1938.

Q. 1938. Prepared on that date?

A. To the best of my knowledge, that is when it was prepared. That is when it is dated.

Q. Well, I am asking you what your knowledge is. Are you depending on the date that appears there, or do you have any other knowledge, other than the date that appears on the document?

A. About that time there were some price changes in Michigan, and this is the price list that we mailed
30033 our salesmen, right after these price changes went into effect.

Q. You would say it was in April, 1938?

A. That is right.

Q. Do you vouch for the accuracy and correctness of the figures appearing thereon as the prices that were quoted by your salesmen to your trade at and after the publication of that document?

A. This price list was prepared by an employee in the office in accordance with the methods that I prescribed to him, and it was checked by two people as to accuracy, and then issued to the salesmen.

Q. I am asking you whether or not you vouch for the truth and accuracy of the figures.

A. As near as I could vouch for any employee I vouch for those figures. I did not go through and check every freight rate to every town.

Q. Do you rely on this as being accurate?

A. Yes, sir.

Q. What about 2.10 opposite the 2.18 that has been stricken out, opposite Buena Vista? Is the 2.18 correct, or the 2.10?

A. That is a correction. 2.10 is now correct.

Q. Not 2.18?

A. That is right.

Q. When was the correction made?

A. When the error was found.

30034 Q. Can you tell us when that was?

A. No, sir.

Q. Whether it was the next day or yesterday?

A. No, I couldn't tell you.

Q. Is that also true of 2.16, the correction opposite Rose City, and 2.16 opposite Snover?

A. Yes, sir.

Now, I remember why those changes were made. Up there in that part of the State there were some railroads pulled up; so we arrived at this price by quoting the same price in those towns as the nearest town where there was a railroad. After the railroad pulled up, why, this town of Rosé City went Harrison, or Harrisonville, if I remember offhand. That is why the change was made.

Q. Can you tell us when?

A. Well, let me see. That was some time during the summer or early fall of 1938 that correction was made.

Q. In other words, the mimeographed figures were the correct ones?

A. Yes.

Q. And the others had become correct as a result of transportation changes; is that correct?

A. Yes, that is right.

Mr. MacIntyre: We have no objections to 1980-A, B, and C.

30035 Trial Examiner Norwood: 1980-A and B and 1982-A, B, and C are received in evidence; objection sustained as to 1981-A and B.

(RESP. EXS. 1980-A, 1980-B, 1982-A, 1982-B, and 1982-C were offered and received in evidence.)

The witness identified Resp. Ex. 1981 as the form used

on July 1, 1937 and since then and at the present time.

30037 (RESP. EX. 1981-A and 1981-B were offered and received in evidence.)

30038 By Mr. Withrow:

Q. About what time did this flat price come in Michigan into being?

A. The first part of January, 1937. I think it was January 4th, but it was about then, at least.

Q. How did you learn of this change?

A. The dealers called me up and told me about it; then later the salesmen began to send in information.

30039 Q. Did you check the price at all destinations in Michigan?

A. No, but the information came in from various points over the State quite rapidly.

Q. Well, what was your first information that there was a flat zone price in Michigan?

A. We continued to pick up town after town with the same price. Then our salesmen called on the phone and told us that the dealers were telling them that the Huron people had advised them through their salesmen that they had one price for every town in the State.

Q. Would you tell us whether or not there was any agreement or conspiracy among the cement manufacturers, to your knowledge, to establish a zone price in the State of Michigan?

A. There was not, as far as I know of.

Q. Did Huron inform you in advance of its change of its intention to quote this price in Michigan?

A. They did not.

Q. Did this change to a zone price amount to an increase in price or to a decrease in price?

A. A decrease in price.

Q. On record page 880, Miss Fowley testified about the inauguration of the flat price during the first week in January, 1937.

Was Miss Fowley in the office at the time of this price change?

30040 A. No, she was away down in southern Illinois on a vacation.

Q. Is there still a zone price in the State of Michigan?

A. No, there is not.

Q. Is tthere a zone price in any part of Michigan?

A. Yes. Wayne County has a flat price, and so do Oakland and McComb Counties, two counties that touch Wayne.

Q. About what time was the zone price for the lower peninsula of Michigan discontinued?

A. In the spring or—the spring of '38; I think it was April or it might have been later, June, somewhere around there—April, May, June, 1938.

Q. Was there any agreement between cement companies, to your knowledge, to discontinue using the zone price in Michigan?

A. No, there was not.

Q. Were you informed by anyone of this change in advance of the change?

A. I was not.

Q. Who led off on the change?

A. The Huron Company.

Q. Did you follow their lead?

A. We followed their prices.

Q. Why did you follow them in this instance?

A. Well, it was a price increase, and the prices were mighty low in Michigan. We were very glad, indeed, to see somebody put them up a little, so we followed as quick as we could.

30041 Q. Was this the first effective price increase in Michigan since you came with the company?

A. That is right.

Q. Now, were you satisfied with the increase in price which the Huron Company made in the spring of '38?

Mr. MacIntyre: I object, if Your Honor please. It is irrelevant and immaterial.

Trial Examiner Norwood: Objection overruled.

A. No, I was not satisfied. It was not enough to suit me.

By Mr. Withrow:

Q. Did you try to raise the price even further?

A. When we sent our quotations out we went higher than they did to a great many towns.

Q. Was this increase of yours effective?

A. No. Nobody followed. So I went down to meet the competition in the field. My price did not stick.

Mr. Withrow: Will you mark this, please.

(The document referred to was marked for identification "Respondents' Exhibit 1983.")

30043 Q. Mr. Calvin, you testified a moment ago that you tried to increase the price even further than Huron did in April, 1938. Why did you try to increase it?

The Witness: We wanted to make a profit on cement.

Q. Well, why wasn't the price quoted by Huron satisfactory?

30044 A. I did not think it was enough money to make a fair profit on our activities, and I thought the cement was worth more, and we ought to be able to get more for it, that the costs were going up, and that they were likely to go still further, and we have been selling cement up there for a great many months and years at too low a price.

You must bear in mind that that company lost a lot of money, and I wanted to make some.

Q. Mr. Calvin, would you tell us whether or not you consider either of your mills to be a basing point, a figuring point?

A. At Bay City the plant is; at Fenton it is not.

Q. Except when you had zone prices in Michigan, has Bay City always been a base since you have been there?

A. It has.

Q. What is the nearest base to your basing plant?

A. Saginaw.

Q. And how far from your plant is that?

30045 A. About 12 miles.

Q. What is located at Saginaw?

A. The Huron silos.

Q. Does Saginaw have the same freight rates as you have in Bay City to most of the points in the State of Michigan?

A. Yes, identical in almost all instances; a few exceptions.

Q. Would you be able to drive any of your competitors out of the territory where you solicit by reducing your prices?

Mr. MacIntyre: I object. It calls for speculation on the part of the witness.

Trial Examiner Norwood: I think you better show that by factual matter.

Objection sustained.

He can give us his actual experience in that regard, if he has tried it.

By Mr. Withrow:

Q. Has it been your experience, Mr. Calvin, that a reduction in price for cement would drive your competitors out of the market?

Mr. MacIntyre: I object. It has not been shown that this witness has reduced any of his prices with the thought of testing out whether it would drive them out.

Trial Examiner Norwood: I hardly think that question was proper. It is leading. You can bring out the facts.

Objection sustained.

30046 By Mr. Withrow:

Q. Mr. Calvin, did you ever experience the reduction in price since you have been with the Aetna Company?

A. Yes, sir.

Q. What effect, if any, did that have with respect to driving your competitors out?

Mr. MacIntyre: Now, what reduction in price are you talking about? Was it while he was manager or while he was with some other company?

Mr. Withrow: That is cross-examination.

Trial Examiner Norwood: It have been within his experience.

Objection overruled.

The Witness: May I have the question?

Trial Examiner Norwood: You give us a factual statement with regard to that, if you have noted the results of your reduction in price, which you testified you have. Please tell us what those results were.

The Witness: The price of cement was lowered in Michigan three times from the time I was in Michigan, and it did not drive any competition out of the market.

Trial Examiner Norwood: Did it increase your business?

The Witness: Sir?

Trial Examiner Norwood: Did it increase your
30047 business? Was this price made by you and all your competitors at the same time?

The Witness: That price reduction was made by a competitor in the field.

Trial Examiner Norwood: Yes.

Well, as actual facts, the prices of all the competitors

in the field came down about the same time, didn't they? The others made it.

The Witness: That is right.

Trial Examiner Norwood: Yes.

By Mr. Withrow:

Q. Mr. Calvin, when Miss Fowley was on the stand she testified that she typed lists of prices bases, so-called base prices. Did she ever do that for you?

A. She did not.

Q. And she also referred in her testimony to a price base at Oswego, New York. Did you have anything to do with this matter?

A. No.

Q. Do you recall whether or not you knew of the existence of the base at Oswego at the time she testified?

A. To the best of my knowledge, there was no base at Oswego during the time she was working for me.

Trial Examiner Norwood: Didn't you say Oswego, N. Y.?

Mr. Withrow: Yes.

30048 Trial Examiner Norwood: Well, he meant Oswego, Mich.

By Mr. Withrow:

Q. Well, has there ever been a base at Oswego, Mich.?

A. Never heard of any such town.

Q. Mr. Calvin, Federal Trade Commission Exhibit 96-A and B purports to be a memorandum written by you to your president, Mr. Johnson. I show you this document and ask you if you recall the memorandum.

A. Yes, I remember that.

Q. Well, down on the second page, toward the bottom, there is a statement to the effect that you learned that the Cape Girardeaux base had gone up from $1.80 to $1.95. On what did you base that statement?

A. From information sent in by the salesmen from the field. They were instructed to get me everything they could get on base prices, or any price activity in the field.

Q. And in addition to sending in specific quotations did your salesmen also send in reports on statements made to them by dealers as to what the price was in their own territory?

A. Yes. They are instructed to send in all information they can about any price activity in the field.

Q. Now, there is a statement in that letter to the
30049 effect that the La Salle base was going to be increased. Did the La Salle base go up at that time, do you know?

A. The letter was written in March 30. No, it did not go up until the fall, if I remember correctly.

Q. And what was the basis of your statement that the base was going to go up?

A. I got reports from our salesmen down in Indiana, and from our distributor over in Wisconsin that competitors' salesmen were soliciting business from the trade on the proposition that the price was going to go up, and that the basse were going to be increased.

Q. Are there any companies which you would consider to be price leaders in your territory?

A. Yes, sir.

Q. Which company or companies?

A. I would consider Huron the most dominant price leader in my trade territory.

Q. Are you free to assert leadership in price if you desire to do so?

A. Yes.

Q. Have you ever led off on a price change?

A. Yes, I led off on a price change.

Q. When? When was that?

A. That was in December of 1936.

Q. Was this an increase or a decrease?

30050 A. Increase.

Q. Why were you anxious to increase the price in December, 1936?

A. So I could make a profit, and then in addition to that labor prices were going up in Michigan, commodity prices like fire brick and repair parts, and all that, and our profits had not been satisfactory, and I wanted to try to get them satisfactory.

Q. Did you write the president of the company for authority to make a price increase?

A. Yes, I wrote him.

Mr. Withrow: Will you mark this, please, as Respondents' exhibit, for identification.

(The document referred to was marked for identification "Respondents' Exhibit 1984-A to 1984-E.")

Trial Examiner Norwood: Did it stick?

The Witness: I am sorry to say it did not. Instead of sticking they put it down three times for me.

30056 By Mr. Withrow:

Q. Mr. Calvin, if you know, would you tell us whether or not the prices, the delivered prices quoted in Michigan were below the level of delivered prices quoted outside of the State of Michigan?

A. Yes, the prices in Michigan were consistently lower than outside, than surrounding States.

30057 Q. About how much, if you know?

A. What date are you talking about?

Q. This is in December, 1936.

A. Oh, probably 20 or 30 cents a barrel, some places more.

Q. Would you tell us, Mr. Calvin, whether or not the price of coal had been increased in December, 1936?

Mr. Withrow: Your Honor, I ask permission to make an offer of proof or to prove that prior to this price increase this witness reported to the president for

30058 authority to make an increase showing the losses of the company for the years 1933, 1934, 1935, and 1936, showing the increased cost, specifically increases in cost of coal, increase in the price to be paid for the bags, both cloth and paper, increase in the cost of firebrick and other materials needed for the repairs of the plant, increases in labor costs due to increases in wage rates; further, to show that the price level where this witness marketed his product was below by more than 20 and 30 and more cents per barrel the price level which existed at other points in the United States, and to show that the witness reported that at the price level then existant he anticipated heavy losses in the months of December, 1936, January, February, March, and April, 1937. I offer to show through this witness all of that, Your Honor.

Trial Examiner Norwood: Well, I think that the witness has shown us everything that is necessary for the purposes of this case along that line. He said that he raised the price, that he reported to the president, and that costs of labor and these other things had gone up.

Now, I will let you answer. You can ask him one leading question about that, incorporate your offer of

30059 proof there, and I will let him answer it, and let us proceed then to bring out further information.

By Mr. Withrow:

Q. Mr. Calvin, you heard my offer of proof.

A. Yes, I heard what you said.

Q. Did you report those things contained in my offer of proof to Mr. Johnson, the president of your company?

A. Yes, I reported them.

Trial Examiner Norwood: And are those statements the fact?

The Witness: To the best of my knowledge, they are.

Trial Examiner Norwood: All right.

By Mr. Withrow:

Q. Mr. Calvin, do you recall how much of an increase in price you thought you should have at Bay City in December of 1936?

A. I had in mind that the price was 30 cents a barrel too low.

30060 Q. Now, she also testified that, about this same increase, that Mr. Rooney stated that he would go along on 20 cents a barrel increase. Would you tell us whether or not Mr. Rooney said he would go along on 20 cents a barrel increase?

A. He did not say anything of the kind.

Q. Miss Fowley further testified that Mr. Rooney apparently later said he would go along on a 15-cent increase. Did Mr. Rooney say whether he would go along on a 15-cent increase?

A. He did not.

Trial Examiner Norwood: You mean he did not say it to you.

The Witness: That is the only thing; I would not know anything about what he would say to Miss Fowley.

Mr. Withrow: Miss Fowley testified he said it to Mr. Calvin.

Trial Examiner Norwood: That he told it to Mr. Calvin?

Mr. Withrow: Yes, that is right.

The Witness: No, he did not tell me anything of the kind.

By Mr. Withrow:

Q. Do you recall how much you did try to increase the price?

A. Well, I actually made quotations and mailed them out trying to get it up a dime.

30061 Q. Now, did Mr. Rooney ever agree to raise the price 10 cents a barrel?

A. He did not. He turned around and put it down early in January.

Q. When you issued these quotations about increasing the price 10 cents a barrel, did you have any assurance from your competitors that your competitors would follow this increase?

A. I did not.

Q. Was there any agreement between you and any of your competitors to make this price increase effective?

A. There was not any.

Q. When you issued the quotation with your 10 cents' increase, did you know whether or not the Huron Company would follow your increase?

A. I did not know it.

Q. Now, Miss Fowley also testified that you called Jennings, of the Wabash Company, concerning this increase. Did you call him?

A. I did not call him.

30062 The witness identified Resp. Ex. 1985 as a telegram from Mr. Johnson; Resp. Ex. 1986 as a memorandum sent to Mr. Johnson and prepared by witness in the regular course of business; Resp. Ex. 1987 A, B as a letter from Mr. Johnson to him. He recognizes Mr. Johnson's signature to the letter. He further identified Resp. Ex. 1988 as a telegram to E. P. Smith, Limestone Products Company, from Aetna sent in the regular course of business; Resp. Ex. 1989 A, B as a letter prepared in the regular course of business which he sent to Mr.
30063 Johnson; Resp. Exs. 1990 and 1991 as memoranda prepared in the regular course of business.

30064 Mr. MacIntyre: Your Honor please, with respect to the pending offer of Respondents' Exhibits, for identification, 1985 to 1991, we object to them on the ground that they are incompetent in the form presented. They do not add anything to the record as it now stands, or, in fact, to the witness' testimony which he has already given. Furthermore, they are irrelevant and immaterial.

I call your attention to one statement appearing on 1990, a statement by this witness to a salesman,—apparently a salesman or two salesmen in his office,—to the effect that the only way he has of getting certain information is what they and other people in his office send to

them. Well, he can tell us about that. In fact, he already has.

For all of those reasons we object to the offer.

Mr. Withrow: Of course Mr. MacIntyre picked out of the documents a statement which has nothing to do with the offer of the documents. Those documents all bear on and are part of the activities of this witness, or letters received by him from his president concerning a price change, which price change has been testified to by
30065 witnesses brought here by the Federal Trade Commission, and they have made that price change an issue here, and we are trying to bring out all of the facts, both through oral testimony and documents written at the time with reference to that price change to show that the change was made by the independent activity of the Aetna Company and not pursuant to any agreement, combination, or conspiracy, as the Federal Trade Commission contends.

Trial Examiner Norwood: Well, now, what is it about these papers that would show that?

Mr. Withrow: Well, Your Honor, this is the correspondence back and forth between this man and other persons in his company which shows how he acted at the time, which tends to negative testimony offered by the Commission that he acted in a different way.

Mr. MacIntyre: Now, if Your Honor please, on that point they show what was done as between this witness and Mr. Johnson, but they fail to show what the Commission's documentary record shows, that the Aetna Company and Mr. Johnson and the others were collaborating with their competitors. It does not negative that testimony at all. It shows a new fact, but it is immaterial and irrelevant in not meeting this testimony here. Let us get an interpretation on this.

Trial Examiner Norwood: Well, I shall have to
30066 inspect those papers there, and if I find that they show what you say they do, or there is the slightest bit of information contained therein on which you could base a useful inference, I shall receive them.

(The Trial Examiner examines documents.)

Trial Examiner Norwood: I shall sustain the objection. Proceed.

Mr. Withrow: Your Honor, I offer to show through these documents that this witness communicated with, and received communications from, officers, including the

president of the Aetna Portland Cement Company, concerning a price advance initiated by this witness' company December, 1936; and further showing that the question of Aetna's increasing the price had been discussed and was being discussed between the officers of the Aetna Company going back to the original employment of this witness and the reasons therefor; and further that this witness informed his salesmen and other employees of the Aetna Cement Company concerning this change, of what the change amounted to, the reasons for making the change, and the effect that the amount of the change would have; and further showing that the Aetna Company issued instructions to all salesmen requesting them to follow the prices being quoted by competitors to determine
30067 whether or not those competitors would meet the price increase made by the Aetna Company, and also further showing that the Aetna Company requested that information be sent in by the salesmen concerning the general reaction among the dealer and customer trade concerning this matter of an increase in price.

Mr. MacIntyre: If Your Honor please, we admit that the record now shows that this witness took up the matter of the proposed price increase in December, 1936, with the superiors of his company, discussed it with them, asked for their approval to make such an increase; that they gave it, including the president, F. R. Johnson; and that he also notified his salesmen of the action that they were taking concerning the price advance, stating the reasons to them why,—not only to his salesmen but to his president; and that he also told the salesmen to pick up any information that they could as to the action that his competitors had taken, or were taking, or later took, with respect to this price advance.

We will admit that the record shows that, and that if it does not, that it may now be taken as so showing those facts.

30068 By Mr. Withrow:

Q. Mr. Calvin, after you issued your quotations in December, 1936, did you follow the effect of this increase in the dealer and customer trade?

A. Yes, I followed the effect of it.

Q. Well, how did you do that?

A. Told my salesmen to phone me and write me re-

ports to tell me what any competitor was doing on the price quotation, and to tell me what the dealers and the contractors said about it.

Q. Do you recall, Mr. Calvin, when you mailed out these quotations increasing the price?

A. I think they were mailed out on the evening of the 9th of December, 1936.

Q. And were they dated the 9th of December?

A. I think they were dated the 10th, to become effective the 15th.

Q. Now, did your competitors meet this increased price?

30069 Trial Examiner Norwood (addressing the witness): Well, tell us whether they were following that.

The Witness: Some quoted it, but the net result was that the price went down January, '37, and then twice more during that same coming year.

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. So that the increase that you quoted was never effective?

A. Never sold a barrel of cement on it.

30070 The witness identified Resp. Ex. 1992-A as a memorandum received by Aetna's salesmen and brought to his attention in the regular course of business; Resp. Ex. 1992-B, C as quotations sent in from the field in the regular course of business and received by

30071 witness; Resp. Ex. 1992-D as a memorandum sent to Mr. Johnson and prepared by witness in the regular course of business; Resp. Ex. 1992-E as a memorandum prepared and signed by witness; Resp. Ex. 1992-F as a report sent in by one of the salesmen; Resp. Ex. 1992-G as a report sent in by one of the salesmen to him; Resp. Ex. 1992-H as a memorandum prepared and signed by him; Resp. Ex. 1992-I as a report sent in by a salesman; Resp. Ex. 1992-J through L as competitive quotations picked up and sent in by the salesmen; Resp. Ex. 1992-M as a memorandum prepared by witness;

30072 Resp Ex. 1992-N as a sales report sent in by a salesman; Resp. Ex. 1992-O, P as competitive quotations; Resp. Ex. 1992-Q as a memo prepared and signed by him; Resp. Ex. 1992-R as a competitive quotation;

Resp. Ex. 1992-S through V as competitive quotations; Resp. Ex. 1992-W as a memo prepared and signed by him; Resp. Ex. 1992-X as a report sent in by a salesman; Resp. Ex. 1992-Y as a memo prepared and signed by him; Resp. Ex. 1992-Z as a competitive quotation; Resp. Ex. 1993-A as a report sent in by a salesman; Resp. Ex. 1993-B through D as competitive quotations. All these documents were either sent or received in the regular course of business.

30078 By Mr. Withrow:

Q. During the recess, Mr. Calvin, there was some discussion about the reasons for discontinuing the Cleveland warehouse.

Will you tell us briefly why you discontinued the Cleveland warehouse.

A. Well, in order for you to see the picture, I would like to tell you about it.

That warehouse is located up the Cuyahoga River, and the depth of that channel is such that we could only load the boats to half capacity, and you have to hire a
30079 tug sometimes, too, to track it in. The dock—the wharf was a rickety wharf. The cement had to be unloaded, put on little hand trucks, and taken up the wharf maybe two or three hundred feet, maybe more, into the warehouse, a very poor building.

Then when it was taken out these motor trucks had to back down a narrow alley, downhill, and be loaded to go out again.

It was just about the most expensive, most unbusiness-like proposition that I could imagine. Why, it was just absurd. It cost so much money.

So after I got there I don't think we ever put another bag of cement in there. We got rid of what we had in there, got from underneath the contract we had with a man that owned the warehouse, and we quit that in a hurry.

Q. Did you discontinue that warehouse as the result of any agreement or conspiracy with your competitors?

A. Nobody said a word to me about that warehouse.

Q. Did you discuss the discontinuing of the warehouse with Mr. J. B. John?

A. I did not.

Trial Examiner Norwood: Did you have a discussion with Mr. Johnson?

The Witness: Mr. Johnson?

Trial Examiner Norwood: Yes.

The Witness: About that warehouse?

30080 Trial Examiner Norwood: Yes.

The Witness: No. He gave me that job of running it, and I ran them the way I wanted to. I shut them up.

Trial Examiner Norwood: You did not let him know before you discontinued it?

The Witness: I don't think I did. I shut those warehouses up just as fast as I could, and told him about it afterwards.

Q. Mr. Calvin, I show you Respondents' Exhibits 1994 through 2022-J, with all the appropriate subscripts thereto, and ask you if these are documents which were either received by or written to you in the regular course of the Aetna's business. Just run through them and look at them.

A. These are all material I received. They are a price file.

Trial Examiner Norwood: A what?

The Witness: What I call a price file, a file of all the information I could get about competitive prices and the price situation in the field. That is what it

30081 is.

30086 (RESP. EXS. 1992-A to 1992-Z, 1993-A to 1993-D, 1994-A to 1994-J, 1995-A to 1995-F, 1996, 1997-A to 1997-G, 1998-A to 1998-C, 1999-A to 1999-I, 2000-A to 2000-M, 2001-A to 2001-Y were offered and received in evidence.)

30089 Q. Mr. Calvin, I show you Respondents' Exhibit 1992-E, a memorandum written by you, and direct your attention to the statement in the third line that one of the quotations was from Chicago. Is that correct?

A. No. That is a typographical error. That was Saginaw. They misunderstood me there. I did not pick up any quotations in Chicago.

Q. Now, on the question of this price increase on December 10, 1936, would you tell us whether or not you discussed this price increase with anyone from the Peerless Cement Company before you sent out your quotations?

A. I did not.

Q. Now, you testified that you increased your prices

around Bay City. Would you tell us whether or not Huron increased the prices around its mills at Alpena and Wyandotte at the same time?

A. They did not at that time.

Q. Did the Wabash Company follow along on this price increase?

A. It did not.

Q. How do you know?

A. From a quotation sent in from the field.

Q. Was it these quotations from the Wabash Company which in effect made your price increase non-operative?

30090 (Question read.)

A. Yes, one of the reasons.

Q. Now, did you issue new quotations after you found the Wabash quotations reducing your price to the former level?

A. No.

Q. I believe you have testified that you did not sell any cement at the new higher price. Just how was this situation resolved,—when did you issue new quotations and under what circumstances?

A. You see, our quotations dated the 10th, effective the 15th of December—now it is customary to take orders for 15-day delivery, so that gets up to January 1st, and right after January 1st, after New Years and the holidays we picked up these quotations of the Huron Company putting that flat price all over Michigan, lowering the price generally, in some cases 15 or 20, and I believe some cases 28 cents a barrel they lowered, so we met those prices. The biggest competitor in the State, they broadcasting it to everyone, you had to meet it if you wanted to sell any cement.

Q. Now, was this price, attempted price increase which you sent out and mailed on the 9th, effective on the 15th, was that the first effective price move after you came with the Aetna Company?

A. As far as I know, it was, in our trade territory.

Q. And was this change in early January, 1937,

30091 onto a zone price for the State of Michigan the second change in price since you came with the Aetna Company?

A. Yes, with the possible exception there was a little flurry in freight rates just there, right around January 1st

or December 31st, they took off that emergency clause, and I think one or two people quoted on it, but it was not general—did not make any difference.

Q. Well, what was the next change in price after January, 1937, that you recollect?

A. Well, the price Huron quoted, some lower price—let me see—I think along in June they dropped the price in the Detroit area approximately a dime, 12 cents, and then I believe it was late August, maybe the 30th or somewhere in there, they put the price down 10 cents more all over the State including the Detroit area for the second time, or the third time, in there.

Q. When you refer to these two price changes, is this file marked Respondents' Exhibit 2000-A the file referring to that decline in June, 1937?

A. Yes, that is the one in June.

Q. And this file, Respondents' Exhibit 2001-A to X, is that the reduction in August, 1937?

A. Yes, ~~that~~ is August.

Q. And was it Huron that led off with both these price declines?

30092 A. Yes, it was.

Q. And did you follow these declines in price?

A. Yes, we followed them.

Q. Now, there is some testimony in this record to the effect that there was a general increase in freight rates in November, 1937. Did the price in Michigan go up?

A. No, the zone price was in, then, and no changes were made. We had to swallow that extra freight and sell cement for that much less money.

Q. Now, was there a change in price in February, 1938?

A. In some parts of Michigan.

Q. And what did this change amount to?

A. Oh, they put it down again in Detroit area, Wayne County, I think it was 5 cents in some parts of that territory, and then up to 12 or 13 or 14 cents in Detroit.

30095 (RESP. EXS. 2002-A, 2002-B, 2003-A to 2003-Q, 2004-A to 2004-H, 2005-A to 2005-Z, 2006-A to 2006-K, 2007-A to 2007-V, 2008-A to 2008-Z, 2009-A to 2009-H, 2010-A to 2010-P, 2011-A to 2011-E, 2012-A to 2012-H, 2013-A to 2013-R, 2014-A to 2014-F, 2015-A to 2015-N, 2016-A to 2016-F, 2017-A to 2017-H, 2018-A to 2018-D, 30096 2019-A to 2019-D, 2020-A to 2020-D, 2021-A to 2021-D, and 2022-A to 2022-T were offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Calvin, at what price do you sell the United States Government?

A. I sell—it is according to where I sell, what price I sell.

Q. Do you sell them at the same price you sell to commercial customers, or special prices or higher prices?

A. No, they get the regular commercial price.

Q. Why do you sell them at the regular commercial price?

A. I do not see any reason why I should sell them any cheaper.

Trial Examiner Norwood: That is, they pay the same price as dealers?

The Witness: Certainly.

By Mr. Withrow:

Q. Now, is the price which you quote to the United States Government the result of any agreement between Aetna and competing cement manufacturers?

A. It is not.

30098 Q. Well, at any destination, Mr. Calvin, do you sell the dealer and the Government at the same price; is that correct?

A. Generally speaking, that is correct.

Q. And the dealer, of course, sells that to the ultimate consumer?

A. That is right.

Q. Now, would you tell us whether or not, from your experience, the Government at any given destination pays less than the ultimate consumer?

30099 The Witness: The ultimate consumer probably pays more, that buys through a dealer, than the Government does.

Mr. MacIntyre: I move that the answer be stricken. He says they probably pay it. It shows that it is speculative.

Trial Examiner Norwood: Well the motion is denied. Explain that, will you, please? Was your answer factual? Do you remember any cases of what was paid, and why do you say that the Government would probably pay less than the ultimate consumer buying through a dealer?

The Witness: If the Government and the dealer buy at the same price—

Trial Examiner Norwood: Yes.

The Witness: —and the dealer re-sells to his customer, it is only natural he is adding some kind of a margin there that amounts to a larger figure than to the Government.

Trial Examiner Norwood: As an actual practice, do you know that they do?

The Witness: Oh, certainly.

Trial Examiner Norwood: They do?

The Witness: Yes, or they would go broke.

30100 Q. Have you ever been asked by the Federal Government to quote f.o.b. mill?

A. Yes, I think I have.

Q. On many occasions?

A. No.

Q. When was the first instance that you recall since you have been associated with the Aetna Company?

A. That famous invitation of the Government.

Q. Is that the Procurement Division invitation of April 15, 1938?

A. Yes, that is the one, the one the record here shows that you called Good Friday.

Q. Did the Aetna Company bid to the United States Government?

A. Yes, we put in a bid.

Q. Did you write a letter to the United States Government to accompany the bid?

A. Yes, we did.

The witness identified Resp. Ex. 2023 A-M as a
30101 copy of a bid of Aetna to the Treasury Department, prepared in his office; Resp. Ex. 2024 A and B as a copy of a letter he sent with that bid to the United States Government. It was prepared in the regular course of business.

Mr. Withrow: Your Honor, I offer in evidence at this time Respondents' Exhibit 2023-A to M, and 2024-A, B.

30102 (RESP. EX. 2023-A to 2023-M was offered and received in evidence.)

30103 (RESP. EX. 2024-A and 2024-B was offered and received in evidence.)

Q. Did you receive an award as the result of your bid to the Procurement Division invitation of April 15, 1938?

A. I did not.

Q. Now, I noticed from your bid that you qualified

your bid re shipments into zone 18, which was Wisconsin. Would you tell us why you qualified your bid concerning shipments into Wisconsin?

A. We had a legal and binding contract with the distributor in Wisconsin. If I had bid as requested by the Government for shipments into that territory it
30104 would have been in violation of this contract, and so I qualified our bid in such a way that we did not agree to ship any cement into that territory.

Q. Would you tell us whether or not you consulted with your attorney before concluding—

A. Yes, I took that bid up with our attorney before I made it.

Q. Now, why did you limit the maximum delivery on your bid to 225,000 barrels?

A. Well, I did not—that is all the business I wanted under those conditions. If you sold all your cement on a bid order to the Government, you could not take care of your regular dealers, regular customers.

Q. Did any of your dealer customers discuss, with you or write in to you concerning this so-called Good Friday bid of 1938?

Q. Yes, I had a few letters from customers on that.

Q. I show you Respondents' Exhibit 2025-A, and ask you if this is one of the letters you received?

A. That is a letter that I received from a dealer in Detroit.

Q. And that dealer is one of your customers?

A. Oh, yes.

Q. And I show you Respondents' Exhibit 2025-B, and ask you what it is.

A. It is a reply to that letter from that Detroit dealer.

Q. And was it prepared and written by you?

A. It was.

30105 Q. In the regular course of your business?

A. That is right.

Q. And would you tell us what you know about 2025-C?

A. What is it?

Q. Would you tell us what you know about Exhibit 2025-C; was that letter received by you?

A. Oh, yes. Little Rock Lumber Company sent that over. It is a copy of a letter that he sent to the Procurement Division.

Q. Are they dealers you solicit business from?

A. They are customers of ours, Little Rock Lumber Company. I made a mistake. This is a copy of a letter from the Procurement Division to the Little Rock Lumber Company.

Q. Which the Little Rock Lumber Company—

A. Sent on over to us.

30108 (RESP. EX. 2025-A to 2025-C was offered and received in evidence.)

30109 Q. Mr. Calvin, when you wrote Respondents' Exhibit 2025-B, did you believe the facts?

30110 A. Certainly.

Q. Are they the facts that you put in?

A. Certainly.

Q. Now, there is evidence in the record to the effect that you received an invitation from the Procurement Division on cement for use by the executive departments of the Federal Government in Ohio and West Virginia, to-wit, F. T. C. Ex. 1394. Do you recall receiving that request?

A. Yes.

Q. Did you bid on it?

A I did not.

Q. Would you tell us why you did not bid?

A. Well, one reason I did not bid was that it was down in Ohio and West Viriginia, and on the previous invitation prices had been quoted so low down there that I did not think that I cared to try to compete with them. Then, another thing, I just did not like the idea.

Q. Now, when you say "prices bid down there," do you mean, for instance, prices bid at Cleveland—

A. That is right.

Q. —and Toledo?

A. Cleveland and Toledo,—points affecting that territory.

30111 Washington, D. C.,
January 11, 1940.

30112 BENJAMIN W. CALVIN thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow (Continued).

Q. Mr. Calvin, would you tell us whether or not you would be free to bid or sell on an f.o.b. mill basis if you wanted to?

A. Yes, I would be.

Q. Why don't you sell on an f.o.b. mill basis?

A. Because our customers want to know what the price of cement is delivered to where they are going to use it.

Q. Now, on record page 880 Miss Fowley testified that you talked to competitors concerning anything you did since you came with the Aetna Company. Is that correct?

A. No, it is not correct.

Q. Now, on record page 843 Miss Fowley testified
30113 that you consulted other companies on prices to be quoted on jobs. Did you ever consult a competitor on a price to be quoted on a job?

A. Not on prices.

Q. Did you ever call a competitor concerning a job?

A. Yes, I have talked to competitors about jobs.

Q. Now, would you tell us when and where and what the conversation was?

A. I couldn't tell you exactly when or where, but, roughly, when I first got with the company they did not have a freight rate department; they had no tariff; they had no traffic department. They had nothing.

Trial Examiner Norwood: Did you ever ask any competitor for any freight information?

The Witness: Yes; certainly.

Trial Examiner Norwood: You have done that?

The Witness: Yes, sir.

By Mr. Withrow:

Q. Well, why did you ask a competitor about the freight rates?

A. I had nobody in our company that handled that, no freight rate department. It was the quickest and easiest way to get it, and I had a great deal to do; so that is the way I got it.

Q. Now, do you have occasion, or have you had occasion to call competitors now to ask them about freight rates?

30114 A. No. We have a traffic department, so we have no trouble with it at all.

Q. Would you tell us whether or not you could obtain this same freight rate information from the railroads?

A. I doubtless could have.

Q. Why didn't you ask the railroads for this freight information?

A. There was a simpler way to get it. There were only a few instances.

Q. Now, on record page 847 Miss Fowley testified that you constantly telephoned Universal about the prices on specific jobs. Would you tell us whether or not that is correct?

A. That is not a correct statement.

Q. Did you ever telephone them about the prices on any specific job?

A. Nothing about the prices.

Q. And in these instances where you say you telephoned and asked for freight rate information, would you

30115 tell us whether or not you were free to quote any price that you wanted to quote after such a conversation?

A. Certainly I was free.

Q. Now, Miss Fowley testified to Aetna or some one at Aetna talking with competitors about the Algona job. Have you ever bid at Algona since coming with the Aetna Company?

A. I have not.

Q. Did you ever discuss the question of bidding at Algona with any of your competitors?

A. No.

Q. Would you tell us whether, to your knowledge, this job at Algona was prior to your coming with the Aetna Company?

A. Yes, I think that was six months or a year before I came with the company.

The witness identified Resp. Ex. 2027 A-G as com-

30116 ing from the files of Aetna; Resp. Exs. 2028, 2029 and 2030 as coming from the files of Aetna.

30121 (RESP. EXS. 2027-A to 2027-G, 2028, 2029, and 2030 were offered and received in evidence.)

Q. Now, on record page 844 Miss Fowley testified about

two small Government jobs on which Aetna submitted bids in April and May, 1937. Do you know what jobs those were, Mr. Calvin?

A. I think she referred to the jobs down in Hastings and I think Yankee Springs down there.

Q. Were those bids to the National Park Service, Department of the Interior?

30122 A. The one of the Yankee Springs was.

Q. Do you know who else bid on these jobs?

A. The one of Yankee Springs was also bid on by the Medusa Company, and I think one or two dealers.

The witness identified Resp. Ex. 2031 A and B as a copy of the bid he submitted, bearing his signature.

(RESP. EX. 2031-A and 2031-B was offered and received in evidence.)

Q. Could you tell us whether or not Aetna received the award on that job?

A. The one at Yankee Springs we did receive the award on that.

Q. Were land-grant rates involved in that?

A. They were not.

Q. Did you discuss your bid on this job with anyone?

A. I did not.

30123 Q. Now, did you make any other bids to the Federal Government during the spring of 1937?

A. I recall we bid a time or two over there on the Western side of the State, places like Whitefish Bay and Mackinac, several requests came in for cement. I think it was from the U. S. Engineers Office.

Q. Would you tell us about your bid to Mackinac?

A. I remember the Government demanded it be delivered by boat or barge in 600-barrel lots, and that it was not practical for us to deliver in such small amounts in our boats. I think the first request was for about 2,500 or 3,000 barrels. And we accompanied our bid with a letter stating that the only way our bid could be considered was for the delivery of the entire amount at one time; that otherwise it would be uneconomical for us to try to get in there by boat.

Q. Now, did you get the award on that job?

A. We did not.

Q. If you know, would you tell us whether or not any of your competitors bid on boat delivery for 600 barrels?

30125 A. Yes. They bid on that work in small lot deliveries by barge and lighter, pulled it in there with a small tug.

By Mr. Withrow:

Q. Now, did you discuss your bid in this instance, or the qualification on your bid, with any of your competitors?

A. I did not.

Q. Did you agree with any of your competitors—

A. No.

Q. —as to what you would bid?

A. No.

Q. Now, Miss Fowley, on record page 844, testified about a certain Sarnia Bridge job. Do you recall that job?

A. Yes, I recall the job.

Q. Could you tell us exactly what happened in this instance?

A. Well, the so-called Sarnia Bridge job is a blue water project running from Port Huron, Mich., to Sarnia, Canada. It was a very prominent project, talked about
30126 for years. Finally it came up. Now, that job was awarded to a contractor by the State Highway Department of Michigan, and the contractor bought his own cement at private sale. Now, I was never asked by anybody or any Government or State or county to bid on that cement. I actually did not even quote anybody on the cement; never even quoted the contractor, did not even try to sell the order. The reason is very obvious: The Michigan side of that bridge goes right across the property of the Peerless Portland Cement Company at Port Huron. The contractor was allowed to set up his operations on their property, on their dock, getting his sand and gravel in over the Peerless dock. Now, what chance did I have of selling that cement. Never even tried to sell it. I sent my salesmen up there and said, "Go up and look it over." He came back and told me this story. I said, "Forget it. There is no use wasting time on it."

Trial Examiner Norwood: How did they make the price on that? Did they charge them f.o.b. mill in that case?

The Witness: Now, Mr. Examiner, I cannot tell you how my competitor made a price, but, here, that mill there has not been operated for three or four years, I guess; they probably shipped that cement up there from Detroit where they make cement. I do not know whether they did or not. I should think they did.

Trial Examiner Norwood: That is the time the
30127 bridge was built?

The Witness: Sure. This contractor—

Trial Examiner Norwood: They did not give you a chance?

The Witness: If this cement company did a contractor the favor of allowing him to have a set-up on their property, use their dock free, all that, do you think that he is going to buy cement from me? Not a chance in the world.

By Mr. Withrow:

Q. Now, Miss Fowley stated that you talked to the contractor who had this job. Did you ever talk to the contractor?

A. I did not talk to him. I did not know who got it up until this day, I cannot tell you who the contractor is on that job. Did not even waste time on it.

Q. Did you attempt to sell any cement on the Canadian side for the construction of the Canadian side of this bridge?

A. No. I looked into the proposition, found out they had a tariff over there, tried to develop all the information I could as to what the tariff was, and I think I ran into a proposition that it was about fifty or sixty cents a barrel; and then, furthermore, I developed the fact that there was a sort of a gentleman's agreement between the Canadian authorities and the State of Michigan Highway authorities that the materials for the Canadian side would be
30128 furnished by Canada, and the materials for the American side would be furnished by Americans. And when I bumped into that I backed off again, and did not work any further on that job.

Now, we investigated this thing thoroughly, it was a prominent, big job. It was talked about years, and then decided it was hopeless to try to sell it, got away from it, and worked on something else.

Q. Does the Aetna Company allow trucking?

A. We do.

Q. What territory?

A. We truck all over Michigan, some around Toledo, northwestern Ohio.

Q. How about Wisconsin?

A. Yes, truck in Wisconsin, the eastern part of the State.

Q. Do you allow dealers to come to your mill with trucks?

A. Yes, we allow them to, but we do not like the proposition. It is a lot of trouble.

Q. Does the Aetna Company hire trucks for the delivery of cement?

A. Yes.

Q. Are these contract carriers or common carrier trucks, or independent trucks?

A. Well, they are classed in Michigan now, under the Public Utility Act, the same as contract carriers, and some as, I think they call them, limited common carriers;
30129 more or less a technical proposititon.

Trial Examiner Norwood: Do you base the prices on rail transportation?

The Witness: Well, the prices in some of the towns are arrived at by rail transportation, and when we got some flat zones—you know we talked about—sometimes you base your prices on the competitive conditions in the market, what you think is the lowest price, and meet it.

By Mr. Withrow:

Q. Now, do these truck carriers file their rates with the Michigan Public Utilities?

A. Yes. They are compelled to do that now.

Q. How about these rates—how do these rates compare with rail rates?

A. Generally speaking—

30132 Q. Mr. Calvin, do you on occasions prepay both shipments by truck and shipments by rail?

A. Yes, we prepay the freight.

Q. Do you know what the rates are generally?

A. Generally speaking, I could tell you what we do.

Q. Are there any added costs to you as the result of shipments by truck as against shipments by rail?

30133 A. There is some added cost in the loading and the packing and the trouble of getting it out, and taking care of the service in trucks over carloads.

Q. Now, what is the minimum truckload lot which you ship?

A. In Michigan, the minimum lot now is 90 barrels.

Q. Would you tell us whether or not all your competitors have a minimum of ninety, or whether some of them are different?

A. Some of them are different.

Q. Why do you have a 90-barrel minimum?

A. Well, specifically, I have made a contract with my

truck haulers, and I pay them on the basis of a minimum 90-barrel load, and they base their rates to me on that proposition:

Q. Mr. Calvin, have dealers of the Aetna Company ever written or talked to you about the minimum truckload lot which they prefer?

30134 A. Yes, they have.

Q. What do they say?

A. It seems that a large proportion of them are in favor of the 90-barrel load.

The witness identified Resp. Ex. 2032 as a letter from the company's Grand Rapids dealers, received by him in the regular course of business.

30135 (RESP. EX. 2032 was offered and received in evidence.)

30136 By Mr. Withrow:

Q. Now, Mr. Calvin, you testified that some of your competition had a different minimum truckload lot than you had. Is their minimum higher or lower?

A. It is lower.

30137 Q. Do you truck cement just to a dealer's warehouse or to a job site, or both?

A. We truck to both, anywhere they want it.

Q. Would you tell us, if you know, what percentage of shipments you make you ship by truck as against shipments by rail?

A. My best estimate is about 75 percent of our cement is trucked.

Q. Now, since you have been with the Aetna Company has it ever charged a 15-cent differential for loading trucks?

A. It has not.

Q. Would you be free to change the trucking policy which the Aetna Company now has if you decide to do so?

A. I would.

Q. Do you maintain your present trucking policy as the result of any agreement with any of your competitors?

A. I do not.

30138 Q. Would you tell us whether or not you have ever had complaints from dealers because truckers did not perform the services they were supposed to perform?

A. Yes, we get complaints.

The witness identified Resp. Exs. 2033 and 2034 as copies of letters written by witness to two of his customers. The

letters were prepared by Mr. de Golia, his traffic man, under his supervision in the regular course of busi-
30139 ness; He further identified Resp. Ex. 2035 as a report from one of his salesmen sent into the office. Resp. Exs. 2033, 2034 and 2035 are typical of the complaints he has had about some of these trucking matters. This was the routine way in which they were handled and those letters were prepared in the regular course of Aetna's business.

Mr. MacIntyre: We object to the offer of Respondents' Exhibits 2033, 2034, and 2035 on the ground that they are incompetent, irrelevant, and immaterial. Respondents' Exhibit 2035 is a report by a salesman as to certain facts that he claims to have observed or conditions he claims to have observed at some dealer's warehouse. I can well imagine that Counsel for Respondents wants this in for the purpose of attempting to argue from it that the com-
petitive conditions that this man observed really are
30140 conditions that prevailed, yet we have no way of determining through unsworn statements by parties not called as witnesses whether or not those conditions did prevail.

As to the others, Exhibit 2033 and Exhibit 2034, they are letters written by, apparently, the traffic manager of the Aetna Portland Cement Company concerning their policy, the policy that the Aetna would adopt during May, 1939, and September, 1938, in furnishing help in unloading trucks, or seeing to it that help was furnished in unloading trucks. It most certainly meets no proof that has been offered by the Commission on such particulars.

30141 Trial Examiner Norwood: I think this witness can give us anything that he knows about that situation. He can tell us that he had trouble with the trucks, and that was one of the reasons for not wanting to truck, and when he does he is telling us something that we have heard at least fifty times, and will not add anything to the information in this case at all, and I think that the shortest way you put it in the better it will be for everybody; and I shall sustain the objection to these documents here, which would establish those things by hearsay.

30143 By Mr. Withrow:

Q. Mr. Calvin, is it economical to truck cement in all the territories where you solicit and sell cement?

A. No, some is too far away. We could not truck as far as we ship.

Q. Would you give me an example where you do not truck?

A. We do not truck into the upper peninsular of Michigan.

Q. And how long is the upper peninsular of Michigan?

A. About four hundred to four hundred and fifty miles.

Q. What is the population?

A. I don't know exactly, but it is a very thinly populated section.

Q. Is it a section of Michigan which consumes a large volume of cement?

30144 A. Comparatively, no.

Q. If you decided to truck into the upper peninsular of Michigan, would you be free to do so?

A. Yes.

Q. Now, would you tell us whether or not your failure to truck into the upper peninsular of Michigan is the result of any combination or agreement with your competitors?

A. It is not.

Q. Would you tell us whether or not, if you decided to truck into the upper peninsular of Michigan, you could truck directly to the upper peninsular?

A. Well, we would have to go across the ferries, Mackinaw City to St. Ignace, which is a very impractical proposition.

Q. Do you still ship some of your cement by boat, Mr. Calvin?

A. Yes, we do.

Q. Do you ship in bulk or in packages?

A. Packages.

Q. Why do you ship in packages?

A. Because we haven't any bulk carrier.

Q. Have you ever considered changing from shipping by package to shipping in bulk?

A. Yes, I would like to.

Q. Why would you like to?

A. Much more economical.

30145 Q. Would you tell us whether or not you ship any considerable tonnage by boat at the present time?

A. Yes; we ship quite a considerable tonnage by boat.

Q. And where do you ship most of the cement to by boat?

A. Wisconsin.

Q. What does it cost to ship to Wisconsin compared with the rail cost, if you know?

A. Much more economical.

Trial Examiner Norwood: Well, are those economies reflected in the price after you get it over there?

The Witness: Well, I should think so. If we could not go over there by boats, I could not ship by rail over there and come out with the mill net that I take; got to get over there by cheap transportation in order to compete in that market.

Trial Examiner Norwood: When you get there you sell it on a base plus freight, do you not?

Mr. Withrow: From the base of the mill.

The Witness: I meet the competition that I find in the field.

Trial Examiner Norwood: The base which you figure on, is it?

The Witness: At the present time; yes, sir.

Mr. Withrow: Well—

Trial Examiner Norwood: In other words, the boat economies enable you to extend your business?

30146 The Witness: Yes; it enables me to compete in Wisconsin; otherwise, I couldn't compete at all.

Trial Examiner Norwood: I see.

Go ahead.

By Mr. Withrow:

Q. Well, at what points do you deliver cement by boat in Wisconsin?

A. To Green Bay and Racine.

Q. Now, at Green Bay, are there any silos or mills of any of your competitors for those points?

A. There is a silo—another company has a boat tied up there, with saddle unit in connection with it, in which they distribute cement.

Q. Now, when you sell cement in Green Bay, to whom do you sell it? Do you sell it direct to the customer or to E. P. Smith?

A. We sell through a distributor, Limestone Products Company.

Q. At what price does he sell Green Bay, the price which he finds there or the price which he calculates?

30147 He sells at Green Bay at the price which I tell him.

Q. Which is what?

A. Which I think is a competitive price in the market, which is the best of my information.

Q. Is the competitive price the lowest or the highest?

A. It has got to be the lowest, or at least as low as would meet competition.

Trial Examiner Norwood: Now, is he your agent?

The Witness: He is a distributor. We dictate the policy, price, and everything else to that man.

Trial Examiner Norwood: When he sells he makes a profit? You permit him to make a profit?

The Witness: He is a distributor and works on a commission basis; and we dictate all terms, conditions, and price.

Trial Examiner Norwood: Then, he is your agent there?

30148 The Witness: That is right.

By Mr. Withrow:

Q. Mr. Cree testified at some length about his efficient method of boat transportation. When you took over the Aetna Company, what did you find with reference to this?

A. I found we had these boats to transport cement in, and I think they are very inefficient, and it is a very poor way to transport cement.

Q. Why are you still doing it?

A. Because I haven't got the money to equip myself with a better method.

Trial Examiner Norwood: You say these boats that Cree operated could not carry cement in bulk?

The Witness: Yes. They are not bulk carriers; they are package carriers. And I am using the same boats, and it is not an efficient method. It is very expensive. Bulk carriers is the right way to handle cement. They are quite expensive equipment.

By Mr. Withrow:

Q. Do you sell to everyone who represents himself to be a dealer?

A. No.

Q. Well; how do you determine to what individuals you will sell?

A. Well, we look into the situation and try to

30149 decide whether or not it would be a profitable outlet for us—a good distributor, a good dealer, a good con-

nection—a great many things that bear on the situation. His credit is a very vital item right now.

Q. Would you tell us whether or not the requirements that you insist upon for a dealer are the same in cities like Detroit as compared with some small city in the upper peninsular of Michigan?

A. No, they are not the same. I explained that the local situation has great bearing on whether or not a person would be a good connection for us.

Q. Now, are there any dealers you find your competitors selling cement to whom you would not sell cement?

A. Yes.

Q. Do you sell to any dealers to whom none of your competitors sell?

A. Yes, sir.

Q. Do you have any fixed definition of what constitutes a dealer?

A. No, I have not.

Q. Why don't you?

A. Well, I think it is impossible to lay down a fixed rule. It is a matter of personal opinion and judgment.

Trial Examiner Norwood: Do you put out any
30150 policy in regard to that, as to what you consider a dealer?

The Witness: Not since I have been with the Aetna Cement Company, Mr. Examiner.

(The documents referred to were marked for identification "Respondents' Exhibits 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, and 2050-A and 2050-B.")

The witness identified Resp. Ex. 2036 as a letter that came to Aetna and was received in the regular course of business; Resp. Ex. 2037 as a letter written by one of
30151 the men in the sales department; Resp. Ex. 2038 as a letter received by Aetna in the regular course of business.

The witness identified Resp. Ex. 2039 as a letter that was written to Aetna's salesman.

Examination by Trial Examiner Norwood.

I can describe all of these at one time as letters and memoranda received and issued in the regular course of business.

Direct Examination by Mr. Withrow.

The letters "B.W.C." appearing in the corner of the letters and memoranda were written by him.

30154 (RESP. EXS. 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050-A and 2050-B were offered and received in evidence.)

30155 Q. On record page 867, Miss Fowley testified about the Farm Bureau business in Indiana. Do you still do business with the Indiana Farm Bureau?

A. Yes, sir; we do.

30156 Q. Would you tell us whether or not any pressure has been put on you by your competitors to discontinue selling the Indiana Farm Bureau?

A. None whatsoever has been put on us.

Q. Would you tell us whether or not any competitors have ever tried to get you to discontinue selling the Indiana Farm Bureau?

A. None have ever tried to.

Q. Did you ever discuss with your competitors the question of giving up or discontinuing selling the Indiana Farm Bureau?

A. I have not.

Q. Now, the record shows Mr. Cree selling the Indiana Farm Bureau at three or four points in the State of Michigan. How many points did you sell them to after 1936 after you came to the company?

A. Did you say that the record showed he was selling in the State of Michigan?

Q. In the State of Indiana?

A. Now, may I have that question again, please?

(Question read.)

A. Probably twelve or fifteen points.

Q. At how many points do you sell them today?

A. Roughly, thirty-five or forty.

Q. Will you tell us, if you know, whether your competitors sell them at as many points as you sell them?

30157 A. No, I don't think any competitor sells them at as many points as we sell them.

Q. Would you tell us whether or not you have any objection to selling the Farm Bureaus located in any other State?

A. No, I have no objections if they will apparently make us good dealers, I will be glad to sell them.

Trial Examiner Norwood: How long have you been doing that?

The Witness: Ever since I came with the Aetna Company.

By Mr. Withrow:

Q. Now, do you also sell cement to the Ohio Farm Bureau?

A. No, we haven't got any of them on our books.

Q. Have you ever been requested to sell cement to them?

A. Well, they sent in an inquiry once asking us about selling them. I sent a salesman down there but one of my competitors seemed to have been a better salesman than he was, and they got the business. We did not.

30161 Q. Mr. Calvin, would you tell us whether or not you have continued, since you came with the Aetna Company, the policy of selling to Farm Bureau organizations down to the present time?

A. I have sold them all the cement that I could sell them ever since the first day I came with the com-

30162 pany right up to now.

Q. Would you tell us just briefly how you handle a request to purchase cement from persons to whom you have never sold?

A. Very often the request may come in from somebody that we have been selling for some time, in which case we are glad to get the order, and we usually thank them for it and ship the cement. Other times it is from someone we do not know about and we look them up, creditwise, send a salesman down to see what the situation is, and then make up our mind as to whether or not we want to sell them.

Q. Would you tell us, Mr. Calvin, whether or not you decide to sell the specific dealer as the result or refuse to sell him as a result of any agreement or understanding with your competitors?

A. No, there is no agreement or understanding concerning the situation at all.

30163 Q. Now, do you sell all of your cement through dealers?

A. No.

Q. To whom else do you sell?

A. We sell concrete products manufacturers, ready-mix plants, contractors direct in some instances, and a number of different people,—highway departments,—sometimes the cities buy direct.

Q. Well, how do you determine whether you will sell through a dealer or direct to a contractor?

A. Well, it is usually determined by the type of business as to whether or not the dealer can perform any service on the matter.

Q. Well, what kind of service do you mean?

A. Well, there are certain classes of business that are always handled through a warehouse; you sell your dealer, he delivers it out onto the job, for the customer may want ten or twenty barrels, some amount like that.

Q. Do you have any announced classification of business which you broadcasted to the trade?

A. I have never announced any policy since I have been with the Aetna Company.

Q. And will you tell us whether or not you are free at any time to make sales either direct or through dealers at your option?

A. I am free to sell the cement the way I see fit.

Trial Examiner Norwood: Do you follow a policy
30164 that Aetna had previously announced prior to your coming with the company?

The Witness: Well, if Aetna had an announced policy when I went there, I did not know what it was. I am selling that cement to the best of my ability to make a profit out of it.

By Mr. Withrow:

Q. Is the Aetna Company a member of The Cement Institute?

A. It is.

Q. Was it a member at the time you came with the company?

A. It was not.

Mr. Withrow: Will you mark this, please, as Respondents' Exhibit No. 2059, for identification?

(The document referred to was marked for identification "Respondents' Exhibit 2059.")

The witness identified Resp. Ex. 2059 as letter prepared by him and sent to Mr. Johnson. Witness thought it was a good idea to go back into the Cement Institute and took it up with Johnson because he had resigned from it.

30169 (RESP. EX. 2059 was offered and received in evidence.)

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. Have you ever been an official of The Cement Institute, Mr. Calvin?

A. I have not.

30170 Q. Would you tell us whether or not you considered The Cement Institute to be a body to police the pricing and marketing policies of the industry?

A. I did not consider it to be any such a body.

Q. Has The Cement Institute ever dictated to you the manner in which you should sell your cement?

A. It has not.

Q. Have you ever attended any Institute meetings since you were employed by the Aetna Company?

A. I think that I attended one or two group—that is, sectional meetings, district meetings; that is it—

30171 when they elected a board of directors—or, not a board of directors, elected a district representative.

Q. Would you tell us whether or not at these one or two meetings there was any discussion of price or pricing policies?

A. There was not.

Q. Were there any other items of business at these meetings other than the election of the district trustees from Michigan?

A. That is all, and the meeting would not take five minutes.

Q. Would you tell us whether or not there was any agreement on price or marketing methods at these meetings?

A. No, there was no agreement.

30173 Q. Do you come into competition with foreign cement, Mr. Calvin?

A. No, sir.

Q. Do you have any agreements with any of your competitors about foreign cement?

A. No, sir.

Q. Mr. Calvin, would you tell us from your experience has the reduction in the price of cement resulted in the increased volume of consumption?

A. Not to my knowledge it has not.

Q. Would you tell us whether or not your dealers and

contractors inform you that they find or that they are offered prices which are below your openly announced and quoted prices?

A. Yes, they make such statements as to that.

Q. Would you tell us whether or not you ever make sales below the openly quoted price of the Aetna Company?

A. Yes, I have made sales below that figure.

Q. On record page 855 and following, Miss Fowley testified about unsigned memoranda coming to the Aetna office. Would you tell us whether or not you recall receiving any such memoranda?

30174 A. No.

Q. On record page 857, Miss Fowley testified that on one occasion O'Neil sent out an anonymous communication to some competitor during the time O'Neil and you were both connected wth the Aetna Company. Do you know of any such instance?

A. He certainly never did with my knowledge.

Q. Would you tell us whether or not O'Neil was authorized to send out any such communication?

A. He was specifically not authorized to have any contact with any competitor of any nature.

Q. If such a communication was sent out in the ordinary course of business, would you have known about it?

A. I should have known about it, but that fellow was such a sneak that he might have done something I would not have known about.

Q. On record pages 851 through 854, Miss Fowley testified that you personally destroyed some material which O'Neil had shown to a Federal Trade Commission examiner. Would you describe for us the circumstances surrounding O'Neil's talk with this examiner, and your subsequent actions.

A. Well, to begin with—

Mr. Paulson: There is no proper foundation there. He should probably be asked to show that he was there. I object.

Trial Examiner Norwood: Answer tha from your
30175 own knowledge.

A. O'Neil called me up one night at Lansing and told me that an investigator from the Federal Trade Commission had been in the office. I asked O'Neil what happened and what he said, and all that. I could not get any

definite information from him. That was over the phone. The next day I got back to the office and very naturally I questioned O'Neil about the situation, and I questioned Miss Fowley, also Frank Jennings. They were the only three in the office.

By Mr. Withrow:

Q. Well, did you destroy anything which Mr. O'Neil showed to the Federal Trade Commission examiner?

A. I did not; and further than that I specifically told the people never to destroy anything in the file, to leave them just exactly as they were.

30176 The witness identified Resp. Ex. 1833 A, B as a letter written to Mr. Bolster, prepared in the ordinary course of business.

Mr. Withrow: Your Honor, I offer in evidence,—re-offer in evidence,—at this time, with the added identification, Respondents' Exhibit 1833-A and B. Counsel for the Commission complained at considerable length I did not have the writer of the letter on the stand. He is now on the stand.

Mr. MacIntyre: I raise the same objection to this document now as I did when it was previously offered, that is, it goes in to matters concerning the reasons why the Aetna Company discharged a bookkeeper by the name of O'Neil. We have raised no point about the discharge of O'Neil. The complaint does not cover it. We put in no proof concerning it. We have, in fact, stipulated that the Commission would draw no inferences from the discharge of O'Neil to the effect that in doing so the Aetna Company had colluded and price fixed with its competitors—that is, with respect to the discharge of O'Neil, and it seems to me it is irrelevant and immaterial. I raised those objections before; I raise them now to the same document.

30177 Mr. Withrow: Well, Your Honor, I think it is material and relevant to show the conditions of the company when Mr. Calvin came there, and this all has a bearing on that situation. I further think that the Counsel for the Commission might decide to argue at some later date, or attempt to draw an inference that Mr. O'Neil was fired because he turned over material to the Federal Trade Commission, which, of course, is unfounded, and that document shows definitely why he was fired, and it

further shows that his firing had nothing to do with any so-called unsigned memorandum which Miss Fowley said O'Neil sent out, which this witness said was not done with his knowledge, and was not authorized. It shows that there was no connection between those two incidents, and it shows the type of man O'Neil was, so even if such memorandum were sent out, which I doubt, and which the record does not establish except Miss Fowley's testimony, this company would not be bound by it, and it shows the type of individual who wrote it, whether it was authorized or unauthorized. For all these reasons—

Trial Examiner Norwood: The objection is sustained. I do not think this paper should go in. It has other charges and other statements, Lingeman being dishonest, and various things here. If this witness knows, he may tell us about it now provided they are relevant.

30178 The objection is sustained to that paper. That is not the way to put in that evidence.

By Mr. Withrow:

Q. Now, on record page 859, Miss Fowley testified that Mr. Johnson wrote letters to you on which was written "Please Destroy." Did you receive any such letters?

A. I did not receive any such letters from Mr. Johnson. He always signed his name with a great big hand on everything he wrote to me.

Q. She also testified that memoranda were sent by you to Johnson on which you wrote "Please Destroy."

A. That is correct.

Q. Do you recall—

A. I wrote two or three of that nature to him.

Q. All right. What were the circumstances under which those letters were written?

A. Well, I do not know what that letter shows there, but I discussed, after I had been with the company a very short time, a lot of very suspicious things about our books, and about some of the personnel, and I also found that Mr. O'Neil would take the keys to—

Trial Examiner Norwood: Well, now, I would not give—

Mr. MacIntyre: I did not object to the question because I did not have time. I had intended to move to

30179 strike the witness' answer when he had completed, but I did not want to break in on his answer. I do, however, since it is broken, object now to the question and the answer, and move that both be stricken. We are

getting in through the witness the irrelevant and immaterial matter that we have just excluded in the written offer.

Trial Examiner Norwood: Read the question. I think he said to explain the nature of those documents.

The Witness: That is right.

Trial Examiner Norwood: He may do that, but as far as some of these suspicions he had as the result of certain investigations, and so on, I do not want him to give us those as an answer to that question.

Mr. Withrow: I think I can shorten this by asking him this: were all of those letters and memoranda about the internal details which you found at the Aetna Company affecting the personnel?

The Witneess: That is what they were. They were about this fellow O'Neil, and I sent them to him confidentially and told him to get rid of them.

By Mr. Withrow:

Q. Why did you tell him to get rid of them?

A. Because I did not want this fellow O'Neil to go around and hire a lawyer and accuse me of a lot of things, and sue me, if I could not absolutely prove 30180 in court that which I was convinced was true in my own mind.

Q. Did any of these memoranda have anything to do with the sales policies or marketing policies of the Aetna Company?

A. Not a one of them. They were all about that internal broil out there in that company when I got there.

Q. Now, on record page 858, Miss Fowley testified that she was instructed not to make copies of correspondence concerning trucking and warehouses. Did you give any such instructions?

A. I never did. I told her to make a copy of everything we wrote and put it in the file in the right place.

Q. Would you tell us, if you know, whether that was done after you came with the company?

A. She was told to. She had the files all messed up, and she was a mighty poor stenographer at fixing files, but she was told to put them in there.

Q. Now, on page 851, Miss Fowley testified about instructions to remove things from the files and destroy them. Did you give any such instructions?

A. I never told her to destroy anything. Now, what I did tell her was this: She had everything filed alpha-

betically, A to Z, for one file. I at once set up two sets of files, one a sales file, pertaining to the customers, selling cement, and all that, and then another file which was the general administrative file of the company's business, and I eternally had trouble with her getting her to
30181 put copies of the letters in the right files. I often told her—I would see a file: "This does not belong here; put it over in that one," but she was so determined to file everything from A to Z in one basketfull that you could not get her to do anything else.

Q. Now, on record page 862, Miss Fowley testified that you told her not to talk with the Government investigators. Do you recall this incident?

A. About as soon as I came with that company I took everybody in the office, including the salesmen, and told them not to talk to anybody about any company matter under any consideration, that I was responsible for the conduct of that company and I would do all the talking, and that went for any competitor, Government investigator, or anybody else. I took them right in my office and told every one of them.

Q. Would you tell us whether you did that in order to hide information from the Government?

A. No, I did it because it was my job to run that company, and to dictate the policy, and I would do it.

30182 By Mr. Withrow:

Q. On record page 864, Miss Fowley testified that Mr. McKeen attempted to get in touch with Harold Cree to find out from him what had been told to the Federal Trade Commission. Do you recall this incident?

A. I recall that I talked to Mr. McKeen about getting in touch with Mr. Cree.

Q. What took place at this conversation between you and Mr. McKeen?

A. Well, that was after we had been cited by the Federal Trade Commission, and I went to our attorneys. Mr. McKeen is attorney in the firm that handles our business. I talked the matter over with him, and here we were accused of a great many things, all of which happened before I went with the company, and the most natural thing in the world for me to do was to get hold of Mr. McKeen and tell him to get hold of Mr. Cree, and find out if this was the condition of the company—if these were the things he had been doing or not.

Q. Now, on page 883, Miss Fowley stated that she was included by her employer in conversations on business matters.

A. She used to stick her nose into everything, if that is what she meant.

Q. On record page 1030 there is a reference to a letter written by you to Mr. Johnson asking him to get certain information from Mr. Hogan of the Lone Star
30183 Company. Do you recall that letter?

A. Yes, I recall the letter.

Q. Why did you ask Mr. Johnson?

A. Well, Mr. Johnson was not familiar at all with sales costs in selling cement, and I knew about where my cost was about to light, and I wanted him to talk around to some of the other fellows so he could judge whether or not I was spending too much money in selling cement, or get some firsthand information and not rely wholly on what I told him was sound policy.

Q. Mr. Calvin, I show you Federal Trade Commission's Exhibit 97-A to G, and direct your attention to the second line on the second page, and ask you to explain what you mean by the phrase "Ethics of the industry"?

A. Well, as far as I am concerned, what I meant by "ethics" was selling the cement on what I thought was a sound policy, and my general announced policy through my salesmen to the trade. It is in contrast to going out and chiseling all the time, double-crossing your dealers, like they had been doing before up there. It was more in conformity with what I thought was a square deal to the customers.

Q. F.T.C. Exhibit 417-W to X, inclusive, suggests that Huron should feel free to call up Aetna and find out what prices Aetna was quoting. Did Huron ever do that after you were there?

30184 A. No, they never called me up.

30185 Q. Mr. Calvin, on record page 616, Mr. Cree testified that you criticized him concerning his water deliveries. Before you came in with the Aetna Company, were you in competition in any way with water deliveries made by Mr. Cree?

A. Not at all. We were a land company, and were not concerned at all with water transportation.

Q. What mill?

A. Mill at Cement City, Mich.

Q. Is that on the lakes?

A. No, no.

Q. Could you have used water delivery from that mill at all?

A. No, we could not.

Trial Examiner Norwood: Did you criticize him?

The Witness: I don't remember ever criticizing that fellow. I might—I don't see how it could ever concern me.

30186 A. I don't know of any time that I criticized Cree on boats or water transportation.

Q. Mr. Calvin, this morning you testified about a committee on which you were appointed to draft something for Article XI, which never met.

I show you Federal Trade Commission Exhibit 27, and ask you if, to your knowledge, that is the same committee as is referred to in the third paragraph of that letter.

A. That seems to be.

Q. Federal Trade Commission Exhibit 418-A to D, being a letter of July 29, 1936, refers or states that the Aetna Company stole a contract from the Wabash Company as a result of Wabash reducing the base at Saginaw and at Bay City.

Now, in coming with the Aetna Company, did you take any steps to have this base removed or to have the

30187 base increased?

A. The step I took was in December of '36 that I tried to raise the price myself down there.

Q. That is the increase which you have testified—

A. That is right.

Q. —which you tried to make, which was not effective?

A. That is right.

Q. Did you ask Mr. Jennings, shortly after you came with the Aetna Company on August 1, 1936, to raise the price or raise the base at Bay City?

A. I did not.

30189 Q. Now, this morning, we asked you some questions about trucking rates, and that you had a contract with some of these limited carriers. Could you tell us on what basis you have arranged to pay the contract trucker?

A. My present basis with those contract truckers is that with the exception of a very small zone around our plant, that we have agreed to pay them for trucking cement a

figure identical to the freight rate from our plant
30190 to the destination to which they deliver the cement.

Q. Now, when you were negotiating this contract, did you attempt to get lower trucking rates to all points than the rail rates?

A. Yes. We have attempted to get lower—they have been trying to raise the rates on all us all the time.

Q. Did you compete with Harold Cree prior to the time you came with the Aetna Company?

A. Yes. He was a competitor when I was with the Consolidated Cement Corporation.

Q. What kind of competitor did Cree make?

Mr. MacIntyre: Now, if Your Honor please, it is calling for speculation and conclusions and opinions. Let us find out what the facts are and the courts and the Commission can judge.

Trial Examiner Norwood: The objection is sustained. Bring out the facts that will show what kind of competitor he was, whether he cut prices, or just what he did.

30197 Q. Now, Mr. Calvin, there has been considerable testimony in the record about losses in excess of around $700,000 in the last years of Cree's sales managership. What has been the result of your operation of the Aetna Company?

A. We have made a profit each year.

By Mr. Withrow:

Q. And that is in spite of three reductions in the prices of cement over that period?

Trial Examiner Norwood: I would not lead him.

By Mr. Withrow:

Q. Well, has it been? Would you tell us.

A. Yes. We have made a profit each year, and the price went down three times the first year I was with the company.

Trial Examiner Norwood: Do you think you made the profit in spite of the price reduction or by reason of it?

The Witness: Made it in spite of it; cutting out all those warehouses and all his expensive methods of distribution.

30198 The witness identified Resp. Ex. 1834 as a memorandum prepared and signed by him in the regular course of business; Resp. Exs. 1835, 1836-A, C, 1837-A, B and Resp. Ex. 1838-A to C as memoranda prepared by him in the regular course of business; Resp. Ex.

1844-A to C and Resp. Ex. 1845-A, B as letters prepared and signed by him in the regular course of business. Resp. Exs. 1846-A, B and 1847-A to I came to his attention.

30199 Trial Examiner Norwood: Did you receive that in due course of business?

The Witness: Well, you see, Mr. Examiner, this is a letter from Arthur Anderson & Company, certified public accountants, that we employed after I went with the company. We changed our certified public accountants, and this is a letter that they wrote to the company in connection with their work, and their custom was to send Mr. Johnson a copy of it and to give me one, and that is how this came about.

By Mr. Withrow:

Q. So you received a copy of 1846 and 1847?

A. Yes. The same thing goes for this one.

Mr. Withrow: Your Honor, at this time I would like to offer in evidence Respondents' Exhibits 1834, 1835, 1836-A, B, and C, 1837-A and B, 1838-A, B, and C, 1844-A to C, 1845-A to C, 1846-A and B, 1847-A through I. These documents were previously offered, but Mr. MacIntyre objected on the ground that the witness who wrote them was not here. The witness wrote all but the last two documents.

30200 Mr. MacIntyre (after examining the documents): If Your Honor please, we object to this entire offer. Respondents' Exhibits 1846-A and B and 1847-A to I, for identification, are two lengthy reports by some auditors, or accountants, to the president of the Aetna Portland Cement Company, Mr. Franklin R. Johnson. It seems to me that we should have something more than a mere summary reports in the form of letters if we are to take any of the factual data contained therein as evidence. They are incompetent; further, they are irrelevant and immaterial to the issues here; further, they are hearsay, and we object to those on those grounds.

Trial Examiner Norwood: Well, is this offered to show the motives for discharging Cree?

Mr. Withrow: No.

Trial Examiner Norwood: What are you trying to show by these documents?

Mr. Withrow: I am trying to show the condition of the Aetna Portland Cement Company, Your Honor, and I

as trying to corroborate the testimony of this and
30201 other witnesses on points affecting the financial status of the Aetna Company, a matter which has been attacked by Counsel for the Commission orally, not as yet by any testimony, except the original testimony by Mr. Cree that he made a lot of money. But I am more interested in the other documents which were prepared by this witness and which Mr. MacIntyre has not as yet referred to, which, taken together, tend to show the individual action of this company and tend to establish the state of the company, so that a complete—

Trial Examiner Norwood: Well, I rather doubt the relevancy.

30204 Mr. Withrow: Your Honor, we are not offering those documents to prove a specific transaction, but what came to this witness' attention, what he acted on; that is the purpose of showing those; the facts as they came to him, not the question of whether or not what someone else told him, or the check he received was all right.

Trial Examiner Norwood: I think he has covered it. I shall sustain the objection to the entire proffer.

Cross-Examination by Mr. MacIntyre.

Q. Mr. Calvin, just prior to and during the time you have served as a witness in this case, have you discussed this case—that is, the matters about which you were to testify with anyone?

A. Well, now, we have had these attorneys for a good many months, and I have discussed with them the facts of this case time after time.

Q. Have they submitted to you written questions asking you to prepare answers thereto on various questions about which you testified here?

Mr. Withrow: Your Honor, I object to this. We are wasting time. I do not see what purpose it could
30205 serve. It is not relevant and material to any of the issues in this case. There is no foundation for this line of inquiry.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: Please read the question again.

Trial Examiner Norwood: Read it.

(Last question read.)

A. They have showed me questions that they might ask.

By Mr. MacIntyre:

Q. That is, written questions?

A. Some of them were reduced to writing.

Q. What about the answers? Were they reduce to writing also?

A. I told them the facts as I saw them, and in some instances they were taken down by stenographers and later transcribed onto paper.

Q. Who took them down?

A. Stenographers.

Q. Well, who were the stenographers?

A. I don't know their names.

Q. Where were they?

A. One of them is in my office.

Q. In your office?

A. That is right.

30206 Q. After the questions and the answers were taken down, did you check them?

A. I went over the answers and went over some of the questions.

Q. Discuss them with anyone?

A. Generally speaking, I discussed this case with Counsel many times.

Q. I am talking about the questions and answers that were put down in the form that you describe.

A. We had practically no discussion about them after we had gone into the matter. We might have discussed them a little, some of them were sent to me by mail after they were written up.

Q. That is, the copies of the questions and answers were sent to you by your counsel?

A. Copies of the transcript dictation that I gave.

Q. That is the questions and the answers?

A. The answers.

Q. Is that correct?

A. The answers.

Q. Well, did you know to what questions those answers were that were sent to you through the mail by your counsel?

A. Yes, I knew what they were.

Q. When was the last time you saw those answers in written form, Mr. Calvin?

30207 A. Well, now, the last time that I went into them and looked inside was probably two or three weeks ago, although in the meantime I might have glanced through them a time or two, but I have not paid any attention to this thing for two or three weeks. They called me up the other night, Friday night, and told me to come on here, and I came along.

Q. Well, what was the last time that you saw any of these written questions and answers about which we have been talking?

A. Well, now, the last time that I saw some of these was inside of a brief case laying up in my hotel, and I did not even bother to take them out or open this brief case.

Q. When was that?

A. Well, that brief case is laying up in the hotel, and I brought that with me when I came on the airplane. It has been laying on top of my bureau in my bedroom because I thought I was going to come back here about two weeks ago, and the brief case and this stuff has been laying there ever since, and when I came I put it in my traveling bag and brought it along with me.

Q. It has been kept by you in your hotel room here in Washington during the course of your testimony; is that correct?

A. It is up there in that brief case, but if it is of any interest to you, I have not even opened the thing.

30208 Q. Well, you kept it there in your hotel room during the course of your testimony; is that correct?

A. It has been in the hotel room; that is right.

Q. Now, going back to the time that these answers were first copied down by a stenographer, when you and counsel were having them taken down, are they today as they are in the—set in your bag in your hotel room here in exactly the same form as they were originally taken down by that stenographer in your office, or have some of them been revised just slightly?

A. Well, now, when this girl took down some of this stuff she misspelled words, got things wrong, and perhaps they have been changed in that item. I can't tell you there has been absolutely no change made in them.

Q. Well, are you willing to testify now that there have

been no changes in those other than typographical errors since they were originally taken down?

Mr. Withrow: Your Honor, we have no objection, of course, if Mr. MacIntyre wishes that the witness answer; I think we are prolonging this thing, this line of inquiry away beyond any reasonable bounds. I do not think it proves anything. It has no bearing on the issues in any way.

Trial Examiner Norwood: I think he is entitled to bring out all the facts.

The objection is overruled.

30209 A. Now, I would have to go and examine all this very carefully and do a lot of comparing, to tell you what I know or what I do not know about the exact status of those pages that you refer to.

By Mr. MacIntyre:

Q. Well, you do know, as a matter of fact, Mr. Calvin, that changes were made other than typographical changes in some of those answers from the time they were first taken down and the time that they were put in the form in which they now repose in your hotel room?

A. You tell me I knew that. That does not require any answer from me.

Trial Examiner Norwood: Is that true or not true?

By Mr. MacIntyre:

Q. Is that true or not true?

A. Let's read that question again.

Trial Examiner Norwood: Read it.

(Question read.)

A. There might have been some changes made.

Q. As to all of the answers that were put down the first time that they were taken by that stenographer, had you given all of them here as taken down?

30211 A. No, that would be impossible. I answered these questions as they came up, to the best of my knowledge, and the facts in the case, and whether it is like those questions and answers, I do not know. I did not pay any attention to them. I think about the first three questions, when they asked my name, who I worked for, and how long I worked for the company might be identical. The rest of them just came to my mind here.

30213 Q. Now, as to this O'Neil and Federal Trade Commission investigator matter that Mr. Withrow

questioned you about, don't you recall, Mr. Calvin, that you wrote to Mr. Carmichael, an investigator of the Federal Trade Commission and told him that he should
30214 not have talked to Mr. O'Neil about any of the practices in the industry and the practices of your company?

Mr. Withrow: Your Honor, I object. The letter is the best evidence of what Mr. Calvin wrote, and I demand Counsel for the Commission produce it.

Mr. MacIntyre: Well, we are asking the witness.

Trial Examiner Norwood: I do not think he is trying to show the contents.

Mr. MacIntyre: I am talking about the subject matter now.

Trial Examiner Norwood: That is, just describe the letter in any way, and not attempt to show the contents of any letter.

Mr. Withrow: He described the contents.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: The objection is overruled. He can do that on cross-examination.

Mr. Withrow: Your Honor, may I move to strike everything after the word "and told him that" because I do not think that is a proper part of the question.

Trial Examiner Norwood: This is cross-examination. I think he can do that on cross-examination, unless I have lost my perspective completely on that. I will ask Mr. Leisure about that.

30215 Mr. Leisure: I think the letter is the best evidence.

Mr. MacIntyre: Well, this man seems to have a good recollection.

Trial Examiner Norwood: I think he can do that on cross-examination.

Go ahead.

A. I remember that I wrote Mr. Carmichael a letter, but I could not tell you exactly what I said unless you let me see the letter. I do not think I made any such statement at all telling Mr. Carmichael how he is supposed to run his business.

By Mr. MacIntyre:

Q. You do not recall that you told him that he should not have talked to Mr. O'Neil?

A. I do not think I told him that at all. I might have told him that I would like to have him talk to me, but I did not tell that man how he could run his business. It is up to him to do as he pleases.

30216 Q. I believe you told Mr. Withrow on direct examination that it was your desire that Mr. O'Neil not talk with federal investigators until you had given your approval; is that correct?

A. I did not say anything about my giving my approval to Mr. O'Neil talking to any federal investigator or anybody else. I testified that I lined up all that personnel, told them that not one of them could talk to anybody about any company policy or matters but me, and that went for everybody, federal investigators, competitors, salesmen, and everybody else. I told my salesmen when

30217 they were out working in the territory that they were not to talk to other salesmen about our business at all, just say nothing.

Q. You would not want them, then, to be able to sit down and discuss company policies with an investigator of the Federal Government who was out attempting to find out what the facts were in the industry; is that correct?

A. I do not think that my salesmen are competent to discuss those kind of matters of policy, with anyone. It seems to me that that is a matter that is generally and should be handled by the executives of the company. Now, there are lots of things I do not like my salesmen to handle. Gee, if a fellow owed us $25,000, and I thought he was going to go broke, I would probably go around and try to collect it myself.

By Mr. MacIntyre:

Q. You don't believe, then, those representatives of your company are competent to tell federal investigators what the facts are as to the practices of the industry and your company as well; is that correct?

Mr. Withrow: Your Honor, I object to that. It has been answered twice by this witness.

Trial Examiner Norwood: I think he can answer

30218 that on cross-examination.

Read it.

(Question read.)

A. I cannot answer the question, Mr. Examiner. I will ask him to please rephrase it.

By Mr. MacIntyre:

Q. In other words, you feel that people in the Federal Government employ are likely to ask such questions as those, and your salesmen are not likely to be able to know what they mean; is that correct?

A. What does the pronoun "those" refer to in your statement?

Please read this over again and see if I understand it.

(Question read.)

Q. I am talking about the questions that have been asked you here.

The Witness: I missed that remark. Will you read that over.

(Question read.)

A. Mr. Examiner, do you want me to answer that question?

Trial Examiner Norwood: Answer it if you can.

A. It is so ambiguous and mixed up that I cannot answer it, and I am sorry.

Trial Examiner Norwood: Well, do you think that your employees should not answer the factual ques-
30219 tions of the Government officials with regards to the trade, and matters about your business?

The Witness: Well, if it is a legal matter, and legal for them to answer,—legal to have it asked,—why, I would say, of course, let them answer it; but I think I am in much better position to tell about my company's policy than some $150-a-month salesman.

Trial Examiner Norwood: But the instructions you gave them would preclude their doing that, would it not?

The Witness: Yes, those instructions I gave at that time probably would preclude it, and there was so much wild talk about these salesmen around the territory, that the Aetna Company, that I once and for all wanted to shut them up, and to go out and sell cement. I would do the talking.

Trial Examiner Norwood: You felt you were within your rights to tell them that?

The Witness: Why, certainly, I thought I was.

30220 By Mr. MacIntyre:

Q. Now, when was it that you became connected with the Aetna Company; August 1, 1936, is that correct?

A. That is right.

Q. Did you believe that you noted at the time that you

went with the Aetna Company a characteristic of
30221 Miss Fowley in her work of inferiority such as you have testified to, or did they develop at some later time?

A. Well, now, Mr. MacIntyre, as I see your question, I first told you I went to work on August 1st, and then you asked when I went to work did I know so and so.

Q. Yes.

A. Now, as I walked in the office the first morning you would not expect me to know all about the stenographer, would you?

Q. No, but when did you first note it, then? When did you first notice all these qualities of Miss Fowley about which you testified?

A. Well, now, it is the proposition that it develops. Maybe the first time she wrote a letter for me she stumbled around in taking dictation, and maybe it was the first letter or the fifth or the sixth that she would bring back jungled around to suit herself, and punctuate it as she thought it ought to be, and she changed my phrasing because she was sure she knew more about it than I did. Those things just come along one after the other.

Q. When did she take the first and the third and the fourth letters in dictation you just described,—about how long after she came with you did you dictate those letters?

A. Came with me?

Q. Yes.

A. She was with the company six or eight years before I went with them.

30222 Q. I am talking about these first five or six letters that she took of your dictation.

A. I know you are, but you said after she came with me, and she was with the company before I went there. Do you mean after I came with the company and she started taking dictation?

Q. Yes.

A. Let's get that straight. Let's get the question read. (Question read.)

Q. When was that?

A. Now, Mr. MacIntyre, I could not tell you what time it was in the day or what day it was in the week, or anything like that, but she started doing work for me probably the first day I was there; I don't know. Mr. Johnson was around for a day or two, and I did not do much office work until he went on East.

Q. Can you tell us in what month that occurred, and what year?

A. Yes, I could probably do that without a great deal of effort. It was in August, 1936.

Q. And what about the letters that she took from your dictation during September, 1936? Were they of the same inferior quality?

A. Well, according to my likes and dislikes. This woman was never a good stenographer, and she did not take
30223 dictation well, and I just did not like her attitude around the office. Now, she was—seemed to be all right to get along with at first, the first two or three months.

30231 Q. Mr. Calvin, I show you Respondents' Exhibit 1997-F, a quotation of the Medusa Company, January 1, 1937, quoting Medusa gray Portland cement $2.15 per barrel, at Saginaw, Mich.

30232 Is that the day on which the—is that date of January 1, 1937, the day on which Huron announced the flat $2.15 price?

A. It is not.

Q. What was the date?

A. To the best of my knowledge, it was about the 4th of January, wasn't it? That is not the flat price.

Q. $2.15 is not the flat price?

A. No, that is not the flat price.

Q. What was the flat price?

A. $2.10, the first one.

Q. I show you Respondents' Exhibit 1997-B, a price effective January 4, 1937, for the Huron Company. Can you tell me whether or not that was announced on January 1, 1937?

A. I am quite sure that it was not.

Q. Do you know what day it was announced?

A. The 4th.

Q. It was announced on the 4th?

A. That is right.

Q. Establishing the flat price of what, for the State of Michigan?

A. $2.10 in all the territory in the State of Michigan or peninsula.

30233 Q. Mr. Calvin, is it your testimony that you have never discussed or mentioned the matter of cement prices with any representatives of companies regarded as

competitors of the Aetna Company since you have been with the Aetna Company?

A. You ask me if that is my testimony?

Q. Yes.

A. You mean what I have already testified in the record? Is that what you are talking about?

Q. Yes.

A. I don't think I made any such testimony as that.

Q. Well, what are the facts? Have you ever mentioned the word "price" in conversations with representatives of your competitors?

The Witness: Now, will you please read that
30234 question over?

Trial Examiner Norwood: Read it.

(Question read.)

A. Certainly.

By Mr. MacIntyre:

Q. In what connection?

A. Now, let us get this thing settled once for all. I was over in Michigan 10 years, 12 years, with the prices going down, cement mills going broke all around me selling cement. The price was so low that I couldn't make a profit where I was. My company went into bankruptcy. And I thought prices were too low, and I told everybody that would listen to me that our price structure was too low. That would include customers, dealers, public officials, competitors, and anybody else who would listen to me. I was putting out propaganda that it was too low.

Q. You put out propaganda to all, including your competitors, to the effect that the price was too low in the State of Michigan and that you wanted to raise it; is that correct?

A. Anybody that would listen to me I tried to convince that we were selling a good product at too low a price.

Q. That included your competitors?

A. Anybody that would listen to me.

Q. And it is included in the period since you have been with the Aetna, since 1936; is that correct?

30235 A. Probably is. Probably is.

Q. Can you tell me about any occasion on which you discussed such matters with your competitors since you have been with Aetna?

A. Oh, it is pretty hard to pick out an occasion. If you want to ask me, I could probably give you a great many. You see, we go to highway lettings, and contractors'

meetings, and banquets, and you meet your competitors, and you kid back and forth, and you joke, and you get serious,—and I probably told them prices were too low.

Q. What was the last time that you told them that they were too low?

A. I don't know. It might have been the last competitor that I talked to. I might have said the price is too low. I think it is now. I think it is 20 cents too low.

Q. When was the last time you discussed prices with your competitors?

A. I don't know of discussions. I might have mentioned it any time I saw them.

Now, I was in Detroit on my way here, and at luncheon one of my competitors came up, and I said "Hello," and whether I said anything about prices being too low in Michigan I don't know.

Q. So you have no specific recollection as to when you did discuss prices last with your competitors; is that right?

30236 A. That is right.

Q. Mr. Calvin, prior to August, 1936, you were employed by the Consolidated Cement Corporation; is that correct?

A. That is right.

Q. And who was your superior—that is, the president of that concern?

A. At what time do you refer to, please?

Q. Well, at the time you left it.

A. You mean when I left it?

Q. Yes; August, 1936.

A. Mr. Storey.

Q. Mr. William Storey?

A. That is right.

Q. Is that the William Storey that is president of The Cement Institute?

A. That is right.

Q. What was your position with the Consolidated Company?

A. I was—I had the title of sales director.

Q. How long did you hold that job?

A. I think it was 9 years, if I remember correctly.

Q. What territory was under your supervision?

A. All the territory for which we shipped cement,—from Cement City, Mich.

Q. Does that include the City of Detroit?

A. That is right.

30237 Q. Saginaw, Mich.?

A. If we went up there, if we got any bids out of there; generally speaking, we shipped cement out of that plant into the southern part of Michigan, northern Indiana, and northern Ohio, and I was in charge of all sales and shipments.

Q. In that connection, you came into direct competition with Mr. Harold Cree, who at that time served as sales manager of the Aetna Company, did you?

A. Yes, sir.

Q. And as a competitor of his I believe you testified on direct you had a poor opinion of him.

A. I thought he was a very poor merchandiser.

Q. And you expressed that opinion, I believe you told Mr. Withrow, to Mr. Johnson when you discussed Harold S. Cree with him during July, 1936.

30238 A. Well, we discussed the general situation at the Aetna Cement Company when I was up there talking about taking this position.

Q. That was when you went to see Mr. Johnson in Boston?

A. That is right.

Q. During July, 1936?

A. That is right.

Q. And you at that time were a sales director of a competitor of the Aetna Company; is that correct?

A. Well, now—

Q. When you went to see Mr. Johnson in Boston.

A. Yes, when I walked into his office in Boston I was sales director of the Consolidated Cement Corporation.

Q. And as such you told him that if you were to take a job as general manager with the Aetna Company he would have to discharge the sales manager; is that correct?

The Witness: Please read that question.

(Question read.)

A. Now, will you please tell me, Mr. MacIntyre, to what you refer by the phrase "as such"?

Q. Well, you said you were sales director of the Consolidated Company at the time you went into his office to discuss this with him, I said as such you told him, what I have just repeated.

A. I will answer yes to the question. Now, as
30239 sales director for the Consolidated Cement Corporation I would act in that capacity if I was out selling cement to somebody. I went back to Boston as an independent person, as an individual, because somebody wanted to give me a job, and I was interested in getting it, and I did not talk to Mr. Johnson as sales director, or anything else. I talked to him as just an individual that wanted a job or was willing to take a job under certain conditions if he would give it to me.

Q. But you still had not given up your place as sales director of the Consolidated Company, had you?

A. No, sir.

Q. I believe you testified on direct that you met Mr. Johnson in the Book-Cadillac Hotel during the week of July, 1936, when he was in Detroit; is that correct?

A. That is right.

Q. Did you have dinner with Mr. Johnson, either in his room or in the dining room of the hotel there, on that occasion?

A. Mr. Johnson and I ate practically all of our meals together while he was there. That probably included breakfast, luncheon, and dinner at night, all three meals.

Q. In the Book-Cadillac Hotel?

A. Oh, we ate sometimes there. Sometimes I took him over—he wanted some fish, wanted to go somewhere, and we went to the Wonder Bar or the restaurant, or we ate
there one night I remember just to—wherever I
30240 thought he would like to go we went.

Q. You had private dining service on one occasion, however, in the Book-Cadillac, didn't you?

A. What did you say?

Q. Private dining service?

A. Not that I remember at all.

Q. You do not have any recollection?

A. No, we did not have it. I know we did not have it.

Q. You are sure of that?

A. That is right.

Q. And you are sure none of these dining engagements with Mr. Johnson in the Book-Cadillac Hotel, that no one attended except you and Mr. Johnson?

A. Did I testify to that?

Q. I am attempting to determine what the facts are.

A. No. You are telling me what I said. I did not say anything of the kind.

Q. I will ask you now did someone else attend?

A. All right. If you ask me a question I will give you an answer.

Q. Who were they?

A. Bob Baker, president of the Peerless Cement Company, and Walter Russell, vice-president and general manager. I called them up.

Q. Competitors?

30241 A. That is right. I called them up one day and asked them to come on over and eat dinner with us, and they came.

Q. With you and Mr. Johnson in the Book-Cadillac?

A. That is right. But that was in the main dining room, no private service, if you are driving at some private service stuff—in the main dining room.

Q. No one else present except you and Mr. Johnson and Mr. Baker and Mr. Russell?

A. That is right.

Q. No one else was there?

A. That is right.

Q. Who paid that bill?

A. I am very sorry that I cannot tell you exactly, but I can tell you the circumstances. I called Walt up, asked him if he would come over and have dinner and bring Mr. Baker along, I wanted him to meet Mr. Johnson. I was getting tired of being with Mr. Johnson all the time, some more company was welcome. Well, Walt said something to the effect, "You have dinner with us," in reply to my invitation that he have dinner with Mr. Johnson and myself. I said, "Oh, well, we will argue about who pays the bill afterwards." Now, then, I think that Walter Russell paid that check. We were sitting there at the table and the check came along and Mr. Johnson said he would sign it, and Mr. Russell grabbed it, and after talking about it, I do not know who paid it for sure, but my best

30242 recollection is that Walter Russell paid the check.

Q. That is, that Walter Russell, of the Peerless Cement Corporation, paid the check?

A. That is what I think happened.

Q. Now, Mr. Calvin, with respect to the sales practices used by the Consolidated Cement Corporation at the time you were sales director of that company, did you use, in

connection with your work, the freight rate book of The Cement Institute?

30245 A. I am almost sure that we did not because the Consolidated people had a traffic department in Chicago, and, as I recall the procedure, we were sent out all of our traffic information by our own traffic manager from the Chicago office. Now, I had a man in our office at Jackson who actually handled this traffic proposition that had been with the company for 12 or 15 years, and I am quite sure that he did not use the freight rate books. We got this information all from our Chicago central office.

30265 Q. Mr. Calvin, you have testified on direct as to why you did not bid on the invitation referred to—that you did not bid on the invitation referred to in Commission's Exhibit 1063.

Now, will you please tell us why you did not? Set forth all the reasons you can recall why you did not bid on that invitation.

30266. A. What invitation is that?

Q. It is the invitation for the October, 1935—for a quantity of cement that the Government expected to use in Rolling Fork, Miss.

A. Now, I will tell you how the circumstances are under a bid like that.

Q. I am asking you now for your reasons why you did not bid on that. Can you tell me?

A. I am going to tell you if you will give me a chance.

Q. All right.

A. I will try to tell you if you can understand it.

I have got a clerk in the sales department that opens the mail. The invitation come in about—we get them now—he will walk in to me and say, "Here is an invitation to some place. Do you want to bid?" Sometimes I will say, "Let's check it up and see if we do."

Maybe here comes one from Nevada, or I get one for cement to be delivered to the United States Engineers on Long Island, or on the Pacific Coast; all I will do, I will ask where do they want it for. If it is for some point like that, I say, "No, we do not want to bid," and forget it, and go on with my other work. Probably this is what happened with Mississippi. The bid come in, and he would say, "Do you want to bid on some cement for Mississippi?" I will say, "No," and go on and attend to my other business.

30268 Trial Examiner Norwood: What is your policy about those alternate bids?

Mr. MacIntyre: That is what I am trying to find out.

The Witness: All right. Maybe we can find it. You know, I am just a small company, and one of the nice things about a small company is that you can handle the situations as they come up. You do not have to have rules and regulations with offices all over America, and have to lay down a law for everybody to follow. I probably handle every invitation I get as an individual proposition, and do as I thought best at the time I got it.

Trial Examiner Norwood: Well, what is your policy about it?

The Witness: Generally speaking, it would be pretty hard to say I had a policy. The last one I got, that one was the Good Friday one, I bid f.o.b. my plant. Here is one that comes along there that I did not bid f.o.b. the plant. Maybe my policy is inconsistent.

30269 By Mr. MacIntyre:

Q. Where an invitation specifies alternate bid f.o.b. mill, f.o.b. point of use, either one, in a situation where there would be a calling for bids, 1,600 barrels of cement for use in Rolling Fork, Miss.?

A. Well, I think the record shows that I have already testified on two or three different times I did bid f.o.b. my plant.

Q. On that occasion?

A. On the occasion of the Good Friday bid.

Q. Well, I am asking about another occasion now.

A. What occasion are you asking about?

Q. The Rolling Fork, Miss., occasion, the one that is referred to in Commission's Exhibit 1063, as Mr. With-

30270 row asked you.

A. I do not know why I did not quote f.o.b. my plant. I do not even know that I gave that invitation more than five seconds' attention, and took one glance at it, and perhaps even less.

Q. You told Mr. Withrow the reason you did not bid was because it was out of your territory.

A. That is all right.

Q. Is it the only reason?

A. The reason I recall, I explained to you, here is a clerk in the sales department comes in with some invitations in his hand, which is the custom to take them and

tell me what they are, and he will walk in and say, "Here is one from Mississippi. Do you want to bid on that?" I say, "No." If you brought one in tomorrow from Louisiana I would say "No," too.

Trial Examiner Norwood: Don't you figure out and see whether you can make any money on it?

The Witness: Here is the general idea. You merchandise your cement and you try to develop your customers in your trade territory geographically where you know you can serve them, or think you can year in and year out, come what may, and I just figured it is wasting time trying to develop business a thousand miles or two thousand miles away. I want to develop business I think I can retain. It costs money to develop.

30271 Trial Examiner Norwood: Repeat business?

The Witness: Certainly, get customers who keep on coming back. I am not interested in some customer in any kind of a town in Mississippi or Louisiana.

30273 Q. Mr. Calvin, referring to Commission's Exhibit 1394, one that was referred to by Mr. Withrow in his examination to you yesterday, I believe you told him that you did not bid on that.

A. I guess that is right.

Q. Why didn't you bid on that invitation?

A. I told you yesterday why I did not bid on it, 30274 gave you two reasons in the record.

Q. What are they?

A. The first reason was that I had seen prices that had been bid a little while before from Toledo and from Cleveland that were so ridiculously low, in my estimation, that I did not think that any price that I cared to quote down there would come anywhere near to getting the business.

Q. This did not call for prices down there. It called for prices f.o.b. your mill, Bay City, Mr. Calvin; didn't it?

A. Perhaps it did, but those fellows quote so cheap at Toledo and so low at Cleveland that I was not going to quote any price at my plant that would get business away from that kind of prices.

Q. You did not make any effort to get business under this invitation irrespective of what price you could have quoted at your mill?

A. Would it have done the Government any good for me to quote $1.75 in my plant to him when they quote $1.10?

Q. What was your average mill net during April, 1938, at the time you received this invitation?

A. I do not know.

Q. Was it as much as $1.50?

A. I do not know.

Q. You are the president of your company now, aren't you?

A. Yes, sir; I guess that is right.

30275 Q. You were general manager then?

A. That is right.

Q. And yet you do not know what your general average return for cement was?

A. I cannot tell you my exact mill nets; no, sir.

Q. I am asking you about the average.

A. I cannot tell you the exact average, either.

Q. You don't even know whether they were above $1.25?

A. Were they above $1.25? When?

Q. April, 1938.

A. No, I could not tell you for that month whether they were above it or below it.

Q. Were they above that for an average for the entire year 1938?

A. I would have to look at my books to see.

Q. You do not recall?

A. No, sir.

Q. Do you consider it important for you to know what your average mill nets are for any particular year's operations?

A. I consider it important for me to have such information that I can get and use when I think it is needed.

Q. But you do not attempt to recall such information or keep it in your mind?

A. I do not litter my mind up with every figure on the books.

30276 Q. What makes you think that the price is too low if you do not know whether—that is, what you are returning at the mill or can't recall what your average mill nets are for any particular year?

A. Let's get that question again and see if we can get it straight.

Trial Examiner Norwood: Read the question.

(Question read.)

A. Well, now, at the time that I made the decision whether or not I wanted to bid down there, it is entirely

possible that I had all this information before me, but because I had it before me two or three years ago does not mean I have got it in my mind this second.

Q. Well, did you have it before you yesterday when you answered Mr. Withrow?

A. Mr. Withrow asked me why I did not quote down there, and I can tell you why I did not quote, and I have told you, but now, then, you are going back and trying to find out some exact figures on which I based my judgment. I know what my conclusion was at that time. I do not think my price, that I would want at my plant, would be competitive down there to get any business, and didn't waste any time quoting.

Q. That is exactly what we want to know—we want to know what you are basing it on, Mr. Calvin.

A. Facts and figures.

30277 Q. The answer you gave Mr. Withrow.

A. My best judgment and information.

Q. You say that they were on facts and figures?

A. I hope they were.

Mr. MacIntyre: I think, Your Honor please, especially in view of what was developed when the cross-examination was first undertaken, that the Counsel for the Respondents had the benefit of consulting the witness, getting all of his answers in writing and revising them with them, that we should have those turned over to us for our purpose of proceeding with this cross-examination, not only for this case, but the testimony had, upon which he relied in giving the answers as revised by the Counsel for the Respondents in this case, such questions and answers that they used in the examination of him here yesterday. It has been demonstrated in the last half hour in an effort to cross-examine this man that it is practically impossible to get intelligent answers and worth while answers to questions put to him in cross-examination, in an effort to clear up answers given by him on direct examination, and we feel that it is only fair that we be given an opportunity to use and examine the data that was used in preparing this witness for the direct examination, and we ask that you instruct the Counsel for the Respondents to give us

30278 those notes that the witness refreshed his memory from while they were preparing him for his testimony.

Trial Examiner Norwood: I think that you have a right

to these according to their own doctrine. It is shown that the witness cannot remember. The notes of the Government's witnesses were turned over to Respondents' Counsel.

Mr. Withrow: Your Honor, there is absolutely no testimony that this witness refreshed his recollection from any notes. As a matter of fact, the testimony is to the contrary. The witness has not looked at them; there is no showing whatsoever. Counsel for the Commission refused our request, and then after some—for some reason or other later handed some of the documents over. I must confess I do not feel that they are entitled to our documents, and we are going to refuse that request.

Trial Examiner Norwood: Didn't you see those answers that you had written in the first instance? Have you reviewed since you made them?

The Witness: Yes, I have probably looked them over.

Trial Examiner Norwood: Reviewed them since you have been here in Washington?

The Witness: No, no.

Trial Examiner Norwood: When did you review them?

The Witness: I do not think I have gone over
30279 those since some time—I think it was some time before Christmas.

Trial Examiner Norwood: But after you had been notified that you were to come down here?

The Witness: To testify now?

Trial Examiner Norwood: Yes.

The Witness: No. They called me up Friday and told me to come down. I have not undertaken to look at them—haven't opened them.

Mr. Withrow: Have you refreshed your recollection from those in connection with your testimony on the stand?

The Witness: No.

By Mr. MacIntyre:

Q. Haven't you seen them, Mr. Calvin, since you were told by Counsel for Respondents that they intended to use you as a witness before they gave you the specific date on which they were going to use you?

A. Well, I went over the facts of this case with the counsel the last two or three months.

Trial Examiner Norwood: I shall request Counsel for the Respondents to produce those documents, and if they

refuse to do it the Commission's Counsel has his remedy. He may subpoena the papers, and then it will be decided by those having authority to decide the thing.

Mr. Withrow: Your Honor, I just want to say one
30280 thing. Mr. MacIntyre apparently asks for two classes of documents. If I understood what he said, —and I generally miss the point of his remark,—he asked for the trial brief which I prepared, that I refused to give him.

Trial Examiner Norwood: No. He asked for questions.

Mr. Withrow: He asked for documents that this witness refreshed his recollection from, and this witneses—other than the trial brief—and the witness has not said there were any, and he said he did not refresh his recollection from the trial brief; consequently, there being no documents falling under the category of Mr. MacIntyre's request. I would be glad, perhaps, to accede to the request, but I cannot, and I refuse to turn over my trial brief.

Trial Examiner Norwood: I request you to produce for him all those questions and answers which were made in the course of the preparation of this witness for giving his testimony.

Mr. MacIntyre: I do not consider that the witness—the notes now in the possession of the witness in his hotel room is in the form of a trial brief, judging from his testimony here. I am not asking for a trial brief.

Trial Examiner Norwood: I will make that request for the record.

Mr. Withrow: Well, the request is refused, Your
30281 Honor.

30282 Washington, D. C.,
January 12, 1940.

30283 Mr. MacIntyre: If Your Honor please, in view of the request that we made on the record at the close of the day yesterday for certain notes which the testimony of the witness shows that he referred to just prior to taking the witness stand here, the notes dealing with testimony that he gave during the course of his testimony, and in view of the fact that our request for that of Counsel for the Respondents was refused, that is, our request for the notes for use in cross-examination, we now move that all of the testimony of this witness that was based on

or incorporated in those notes be stricken from the record.

30286 Trial Examiner Norwood: Well, I am not prepared to say just how far it is conducive to developing the truth of the situation; that is, just how far a witness should be prepared in cases like that.

Mr. Leisure: Well, may I say a word on that, Mr. Examiner?

Trial Examiner Norwood: Where the attempt is made to go to the recollection of the witness as to matters of fact, I can't say just how far it is ethical to prepare your witnesses so thoroughly, to take down every question and to give him those questions and answers during this process of the trial—

Mr. Leisure: May I—

Trial Examiner Norwood: —and just how much it hampers the party who is trying to elicit facts within the memory of the witness, within the normal memory of the witness—

Mr. Leisure: Well—

Trial Examiner Norwood: —and how far it prevents him from making direct answers to those questions without weighing the consequences of his answers, being informed as to the consequences of his answer, and so forth. It seems the profession has developed methods here, many of them new, that I am not prepared to pass upon the ethics of the situation.

30287 Mr. Leisure: As to the ethics of the situation, I supposed we are all governed upon matters of ethics by our natural inclinations, as well as whatever our past training has been in that field.

Now, as well as Mr. MacIntyre, I, too, have had the honor of being in Government service. I have served under three United States Attorneys. And I can say that the practice of those three United States Attorneys, as well as the Department of Justice in Washington, during that entire period of time in examining witnesses in a case was briefly as follows:

A witness would be called in. If he were a friendly witness, a stenographer would be rung for. The assistant district attorney in charge of the case would ask all of the questions that he could think of with regard to the matter in issue. If the witness were a friendly witness at the close of that interview, after all those questions and an-

swers had been taken down, the witness would be dismissed, and you would ask him to come in some other time and look at his statement. In due course the interview would be typewritten, and when the witness came back he would be given the statement and asked, "Will you please read it over and see if it is a correct statement? Make such changes in your answers as should be made if is not, and give it back to me."

30288 With that kind of a witness, if the case was an unimportant case, so that you did not have time to write trial briefs before going to trial, you would read the statement over and you would check the questions in lead pencil out of the group that you wanted to ask, because in no other way could you save the court time without going through the whole interview which you had in your office by that method. That is the only way you could save time, and select the questions which seemed to be material and relevant and would be admissible in evidence.

If it was an important case, and you had time to prepare a trial brief, having checked the questions which you thought were important, you would transfer those to your trial brief.

If the witness was an unfriendly witness, a hostile witness, after the interview was completed, and you had finished all of the questions that you wanted to ask him, you would ask him to please wait a few moments, and after the statement was written you would again hand it to the witness and say, "Does that represent the facts as you know them? If it does not, will you make such changes in your answers as you think should be made and hand it back to me?" The witness having made such changes, you

30289 would then ask him to initial the changes on the side that he had made. After he showed you that that was a correct statement now as it stood, you would ask him to please sign it.

Now, that was the practice, as I say, followed under at least three United States Attorneys and by the Department of Justice during that period. And that is the only practice that has been followed in this case with witnesses, hundreds of witness all over the country, so that a few of us may operate here in the courtroom. It is necessary to send other men to interview them and get their statements and get them to correct them.

Now, if there is any question about that practice, if the

Examiner has any question about it in any way, I want us to take it to the Commission and have it out now, because to me it is a thoroughly proper practice, and, in fact, it is the only way in which you can save time in the courtroom and try a case expeditiously.

Now, I have tried to state my position fully and freely on the record.

Mr. MacIntyre: Well, if Your Honor please, with respect to the showing on the record, that is, our position is what the record shows. We believe it is sufficiently clear to give rise to the motion we have made, and we are willing to rest on the record as it is made on the particulars and as to the basis of the motion.

30290 Mr. Paulson: It is not a question of ethics, as I see it, so much; it is a question of fair hearing; that is—

Trial Examiner Norwood: Well, it is a question of your right to have these papers.

Mr. Paulson: Well, you see what happens here, when Mr. Leisure has one of his men talk to a witness, is this, I believe from the testimony of this witness, the interview was held in his office where all the records were available to him, and we have no way of telling whether he made the statements from his recollection or went to the records. In other words, that prepared statement which Mr. Leisure has the benefit of contains the benefit of a refreshed recollection of this man. Now, when we come to questioning him, why, he has not any records there and we cannot—he has no refreshed recollection. This particular arose, you will recall, when we asked him for the average mill nets of 1938. Now, perhaps on that prepared statement,—and it is presumable that on that prepared statement which Mr. Leisure had the benefit of,—there appears the average mill net for 1938, for Mr. Leisure asked him, or had his counsel ask him, Is your price too low in the State of Michigan, for instance. The only way you can tell that, according to the witness' own testimony is

30291 by looking back at your mill net. He must have known what his mill net was when they asked him, and when we ask him he does not know. If we had the benefit of that statement we would then find out what the mill nets were. That is the question that troubled us there, and is involved in this proposition. Mr. Leisure gets the witness to refresh his recollection, then the witness has a broader knowledge when he asks the question than when

we ask the question unless we have the same prepared statement.

Trial Examiner Norwood: Well, Respondents' Counsel took the position that they had a right to documents upon which witnesses based a general statement.

Mr. Leisure: No, Your Honor.

Trial Examiner Norwood: Had a right to see those documents, to use those documents in cross-examination.

Mr. Leisure: No, Your Honor.

Trial Examiner Norwood: And they had subpoenaes duces tecum approved by the Commission for a great many documents in this deferred cross-examination.

Mr. Leisure: If Your Honor pleases, there is one difference there. The only motion that Respondents made was based on memoranda that the witness had used for the purpose of refreshing his recollection in order to testify in this proceeding.

Trial Examiner Norwood: No, they wanted the
30292 original bids, things like that, on some of these witnesses' general statements.

Mr. Leisure: Oh, that was on another theory of law. For instance, when they made general statements about bids we felt that the bids were the best evidence, and that the bids should be submitted. That was our position on that. But in reply to Mr. Paulson's statement, what he says would be true in the preparation of every case. No lawyer could prepare a case particularly if the issues are complicated without talking to his client and finding out what the facts are, but that does not mean that you are allowed to go back of the trial proceedings and bring into the courtroom everything that the client looked at in preparation of his case. That is not what the rule of law is. The rule of law,—and I hesitate to state a rule of law because, as lawyers, we all know how wrong we may be about the law,—but my understanding is that the rule of law is that if the witness uses something to refresh his recollection while on the witness stand, or Mr. Wigmore has gone a little further and says if he looks at it just before getting on the stand, he thinks it ought to be admissible. As I understand it, that is not the rule. Your Honor in court, I believe, repeatedly said the law only
applies where he refreshes his recollection on the
30293 witness stand. Now, that is the law today the way I understand it.

Trial Examiner Norwood: That is the way I understand it.

Mr. Leisure: That is the way I understand it. Mr. Wigmore has gone one step further, but as far as I know no court of important jurisdiction has followed that theory, that if a witness uses something to refresh his recollection just before getting on the witness stand he sees no difference between that situation and refreshing it while he is on the witness stand, but we can see the reason for the law as it is as against the theory.

Suppose a trial lawyer in a busy jurisdiction like New York is trying cases every day in a courtroom. The night before he goes to trial maybe the first time he has had a chance to talk to his client. I have had cases in which I talked to my client the first time in the subway going to the trial. Now, naturally, it would not be fair, proper, or just, to have any rule of law that would allow some sort of inquisitorial proceeding to find out everything you talked to your client about while you are going to the courthouse. It is very easy to see why the rule of law is as it is.

Trial Examiner Norwood: Well, the record shows my position about that. The only thing is that the Respondents insisted on it so strenuously, and motion—they went
30294 over my head and made a motion before the Commission, and the Commission did not decide that point, but the Commission's Counsel conceded it and produced the documents, and I think in view of the fact that this is a broad investigation, and the primary object is bringing out the truth rather than applying professional rules and introducing so much professionalism in it, I think that it is fair for the Respondents to produce those documents inasmuch as it appears to me that the witness has either read them or had them read to him, or they have been used to refresh his memory during the process of his giving his testimony here during these several days.

Mr. Leisure: There is nothing on the record to that effect, not a scintilla of evidence to that effect.

Trial Examiner Norwood: Do you deny that that is a fact?

The Witness: Yes, sir; Your Honor. I have not looked at that thing since some time in December. It has laid on my bureau at home, and when I came here I threw it in the bag and I have not looked at it.

Trial Examiner Norwood: If I should strike this testimony I think it would be necessary for me to strike a good deal of other testimony as some of the witnesses have said that they have refreshed their memory, and they referred to it right here during recesses, during the hearing,
30295 and I could not,—I think that that will simply go to the weight of the testimony, and that I could not take the responsibility of striking this testimony on that account, so I shall deny the motion, so that the Counsel for the Commission may go before the Commission with it, or they may apply for subpoena duces tecum issued not only for these documents but for documents on which this witness has based a general statement as to—

Mr. Leisure: Or any other legal remedies which they feel they may have under the circumstances.

Trial Examiner Norwood: Yes, I think so. I will deny the motion.

BENJAMIN W. CALVIN thereupon resumed the stand and testified further as follows:

30296 *Cross-Examination by Mr. MacIntyre (Continued.)*

30299 Q. That is your average, approximately. What was your lowest mill net received that year?

A. It is pretty hard to tell. You see, during 1936,—you talked yesterday about a sale made over there in western Michigan—

Mr. MacIntyre: Now, if Your Honor please, I would like an answer to my question.

30300 The Witness: I am going to try to give you an answer.

Trial Examiner Norwood: Answer it directly.

Q. Approximately what was your lowest mill net you received on any sale you made for your company that year?

Mr. Withrow: Your Honor, I object to this question on the grounds that on direct examination we did not go into the question of mill nets of this company; on the further ground, that with other witnesses, when we attempted to go into this, counsel objected; it was not relevant and material to the issues; certainly if it was not relevant and ma-

terial when we raised it, it is not relevant and material when Counsel for the Commission raise it.

Trial Examiner Norwood: The objection is over-
30301 ruled.

Go ahead and answer the question.

The Witness: Will you read the question, please?

(Question read.)

A. Any answer I can give you is just imagination. I will tell you what I think it might be. I cannot tell you—

By Mr. MacIntyre:

Q. Well, was the answer you gave to Mr. Withrow that prices were too low from your imagination? What was that based on?

A. Based on our profit-and-loss statement at the end of the year.

Q. Well, the profit-and-loss statement determines the mill net?

A. Well, the amount of money you get for your cement is reflected on your profit-and-loss statement.

Q. And in your mill net?

A. Sir?

Q. And in your mill net, as well?

A. I do not understand that question.

Q. Do you receive anything else other than your mill nets for your cement?

A. No.

Q. Well, then, you come back to those as a basis for your statement to Mr. Withrow, haven't you?

A. That is up to you to judge.

Q. Well, can you tell us what the lowest mill net
30302 was on the sale that you made for your company?

A. No, sir; I cannot tell you exactly what the lowest mill net was I sold cement at in 1936.

Q. What about the highest mill net?

A. I cannot tell you that.

Q. What about your average mill net in 1937?

A. I cannot tell you about the average mill net in 1937 without looking at my books and accounts and telling you what they were.

30310 Q. Did you ever take the trouble to figure out on these invitations what your mill net would be, or whether or not you could bid f.o.b. mill and get such mill net as you would desire to do so in submitting a bid?

A. No. When I get an invitation to quote on cement to somebody in South America, how am I going to figure the mill net?

Q. I am talking about within the United States now.

A. Oh. Now, I wonder about some freight rates. You know we just have the freight rates published from our plant to a limited number of places. I mean by that,
30311 we have freight rates set up for a good part of Indiana, Michigan, the upper peninsula—most of it, not all of it—Ohio; and if a bid comes up to some point clear outside of my freight rate area where I have ever asked for a rate, I have no grounds on which I can even figure.

Q. Now, Mr. Calvin, in the light of your last answer, now referring to Commission's Exhibit 1394, what freight rate would you have had to figure to bid on that particular invitation?

Mr. Withrow: Which one is that?

Mr. MacIntyre: The invitation in Commission's Exhibit 1394.

By Mr. MacIntyre:

Q. It called for bid f.o.b. your mill, didn't it?

A. Twelve thousand barrels. They say f.o.b. point of production.

Q. At your mill.

A. I guess they were willing to get a price from anybody.

Q. What freight rate would have been involved if you had given them f.o.b. mill, if they had asked for it?

Mr. Withrow: I object. It is wasting time.

Trial Examiner Norwood: Objection overruled.

A. I don't see that any freight rate would be involved, as far as my quotation goes.

30312 The Witness: But a freight rate would be involved as far as the Government is concerned.

By Mr. MacIntyre:

Q. Well, you would not have to figure that; the Government would take care of the figuring of that; isn't that correct?

A. I don't know what they do.

Q Well, if you had bid f.o.b. mill, as asked in that invitation, you would not have had to figure in the freight rate.

A. I could put in a figure.

Q. Why didn't you do it?

A. Now, I explained that yesterday.

Q. Let us get it clear.

A. Well, if it was not clear yesterday, I will be glad to get it clear if I have to sit another week and repeat everything two or three times.

Q. I want it perfectly clear why you did not bid on this invitation.

A. Well, as I told you yesterday, if I recall correctly, that on the previous bid—

Q. What bid is that?

A. Good Friday proposition. I think that is the one. That some prices that I thought were very, very low were quoted at some nearby mills to where this would go
30313 to, and I told you that in view of those it seemed useless to try in any bid for cement to West Virginia, or some place like that; so I just did not bid.

30314 Q. And I will ask the witness if he will please name for me the companies who did bid on the Good Friday bid for the State of Ohio, and the prices they bid, which served as a basis for his judgment that he could not bid for Government invitation, Commission's Exhibit 1394.

A. Now, as I understand the proposition, you want to know what was running through my mind, why I didn't waste time putting in a bid down there.

Now, as I recall the situation—and I may be wrong; this happened two or three years ago—but I believe that there was a price bid by the Huron Company at silos in Toledo, and that they also bid a price at their silos in Cleveland. Now, I think that is right.

Q. What prices?

A. I don't recall.

Q. Do you recall sufficiently about the prices to tell us now what your mill net would have been to have placed cement in their silo and give the Government the ben-
30315 efit of the same price at the location, the same location?

A. Well, if they bid a low price at Toledo for delivery down into West Virginia, it just stands to reason that my freight rate down there would be a great deal more, and it would mean if I were to get any business that I would have to bid 15, 20, 30 cents a barrel cheaper than they did.

Now, there is another proposition that you gentlemen

ought to go back to, that I was trying to develop a sound piece of business for a cement company, to merchandise their cement, so I could stay in a territory year after year. And that is what I was doing, and that is what I had my salesmen doing, and I am not paying any attention now, and did not then, to far off distant business that I don't think it is logical for me to expect to get at all, and I just let it go by the board. I am not worrying my head off about business in Kansas or Mississippi or West Virginia or New York City, or about foreign cement. I let the other fellow worry.

Q. Even if the invitation for such business is f.o.b. your mill?

A. I am out developing business in my own territory, where I can give reasonable service.

Q. You would consider such business unsound, would you?

A. I would consider it poor judgment trying to chase business in South America, that I know I couldn't get, and I don't let my salesmen do it. I would fire them if they did.

30316 Q. Would you like to receive some invitations now, Mr. Calvin, similar to Commission's Exhibit 1394, for f.o.b. mill bids?

Mr. Withrow: Your Honor, I object to that. It is pretty speculative. I do not know whether this witness would like to receive such invitations.

Trial Examiner Norwood: I think he can testify to that.

The Witness: What was the question?

By Mr. MacIntyre:

Q. Would you like to have invitations to bid on such invitations as 1394?

A. No, I am not interested in getting from the Government a little order of cement in 12 years. I have never made a dime on them. I want to develop the business with contract and people with whom I can do business year after year. I am not making a profit from the Government. There is some trouble in Government bidding.

Q. You consider that unsound?

A. Well, in the first place, they don't like the way we do business. If we do business with them, they come in and harass us, like you do. I would like to believe that the man I do business with is a friend of mine and likes to do busi-

ness with me. In this way it is done on a sound basis. You don't do it on a sound business with the Government,
30317 that criticizes you all the time. Now, I don't want to do business with that kind of people.

Q. Suppose one of these favorite friends of yours, not the Government, bids on 200,000 barrels?

A. They don't ask for that. They want to know—

Q. I want to know how you react to such things if they do come your way.

The Witness: Now, Mr. MacIntyre, I can't tell you what I do with some fellow who asks me to quote on 200,000 barrels of cement.

For instance, last summer I had a great deal of trouble with—

Trial Examiner Norwood: What is your policy about that?

The Witness: Let us get it straight. About what?

Trial Examiner Norwood: F.o.b.

30318 The Witness: I quote delivered prices.

By Mr. MacIntyre:

Q. It is contrary to your policy, then, to quote f.o.b. to anyone?

A. I told you yesterday that my policy is general. I told you about the Good Friday proposition.

Q. Can you name any other instance?

A. I can't think of any other instance lately.

Q. Mr. Calvin, is there any difference in the policies, practices, used by you since you have been with the Aetna Company from those previously used by you as a sales director of a competitor of the Aetna, that you can tell us about now?

A. Well, let us read that over.

Trial Examiner Norwood: Read it.

The Witness: It is kind of complicated. Let us see what he is talking about.

(Question read.)

A. Now, generally speaking, Mr. MacIntyre, if you are going to keep up with modern-day competition, you have got to be on your toes—

Trial Examiner Norwood: Wait a minute.

Read the question.

(Last question again read.)

Mr. MacIntyre: He can answer it very concisely.

Trial Examiner Norwood: Now, the question is
30319 whether or not there are any differences, and if there are not any differences. He may ask.

The Witness: That is two questions, then.

Trial Examiner Norwood: I think that is just one. He is asking are there any differences.

The Witness: In the way I sell cement?

Trial Examiner Norwood: Read the question over again.

(Question again read.)

The Witness: Well, I think that is a double question. The first part is, Is there any difference? and the second part is, Could I tell him about them. Which one shall I answer?

Trial Examiner Norwood: Answer the first part.

A. Yes, there are differences.

By Mr. MacIntyre:

Q. What can you tell us about those differences?

A. Well, the foremost that comes to my mind is, I am prepaying freight today, which I did not do before.

Q. How long have you been doing that?

A. I have been prepaying all of it, for, oh, I guess, a week now. Prepaid a good portion of it in some territories.

Q. Any other differences that you can tell us about?

A. Well, it seems to me that the general credit situation in Michigan has gone pretty well to pot. I am
30320 much more liberal with my credit than I used to be, but it seems I can't do it any other way. I would like to.

Q. Any other differences?

A. I suppose if I got down real carefully and examined everything, we could find other differences. You change all the time—the way you sell cement; you have to go out and meet competition. I imagine I changed half a dozen times while I was with Consolidated Cement Corporation, but I couldn't tell you about it now.

Q. Can you tell us now about them?

A. I don't know. You have a lot of things in the Consolidated that you don't have now. The Consolidated policies were laid down by the Chicago office, and we followed instructions. Now, I am in a position where I make my policies. And what I did then would not be as easy

for me to remember as what I am doing now, where it is up to my own decision.

Q. That is the important thing about it. We want to know what change you effected since you have been able to make changes on your own.

A. Well, now, it is only natural, if I have been in the cement business 15 years trying to learn the cement business, that I would not still today be trying to look at it somewhere along about the same way that I learned as a young fellow on the road,—developing business, handling my salesmen to the best of my ability, trying to get
30321 business that is profitable. If I knew a better way, I would change tomorrow.

Q. These are your policies and practices; is that correct?

A. I might tell you another little change, if you want me to.

Q. There is no question pending.

A. You wanted to know all about it.

Q. Yes, if you have any more differences in answer to my question.

A. I just happened to think of one.

Q. All right. Go ahead.

A. When I was down there they laid down the prices to me, and all that kind of thing. Now, I am up in Bay City and I can do as I please. In some instances I make special prices and take business that I might not have before.

Q. Do you let your competitors know of any special price that you make?

A. No, I do not, but they are all smart; they run around to contractors, and they know whether I sell it on the market or cut price.

Q. You do not announce any cut prices?

A. Well, now, you are making an ambiguous proposition, because it changes the picture.

Q. Well, I am asking you a question.

A. You would have to define to me what "cut price" means before I answer.

Q. You just used the term. Use it in the same
30322 sense you used it.

A. We will go back and answer the question.

Mr. MacIntyre: Read the question, Mr. Reporter.

(Record read.)

The Witness: The answer is "No."

By Mr. MacIntyre:

Q. Mr. Calvin, do you know a man by the name of Mr. Bernhart Stroh?

A. I presume you mean Mr. Bernhart Stroh, Jr.?

Q. Yes.

A. Mr. Bernhart Stroh was a citizen of Michigan for many years. He died. Now he has a son Bernhart Stroh, Jr. I know him.

Q. Does he have any connection with the Aetna Company?

A. In this respect, that he is the heir to an estate which holds some stock in this company.

Q. What connection, if any, did he or his father have in the Wabash Portland Cement Company?

A. Now, to the best of my knowledge, they are entirely two different people with no connection whatsoever.

Q. I am not talking about people; I am talking about companies now.

A. Oh, you want—pardon me—you want to know what connection Bernhart Stroh, Jr., or Senior, had with the Wabash Company?

Q. Either or both.

30323 A. Now, I feel quite sure that Bernhart Stroh, Jr., has absolutely no connection with Wabash, and neither has his estate; but the father—I am also in my own mind convinced; I can't prove it—I am also convinced that he had absolutely no connection with the Wabash Cement Company.

Now, if you would come out in Michigan and talk to the old Stroh brothers, you would find out about it, because they fight like cats and dogs.

Q. How much interest did Emil Stroh have?

A. He is dead.

30325 Q. Mr. Calvin, we were, just before the recess, talking about Mr. Bernhart Stroh. Will you tell me whether or not that he attended this meeting in the Book-Cadillac Hotel, the dinner that you and Mr. Johnson had with Mr. Baker and Mr. Russell of the Peerless Cement Corporation during the last week of July, 1936?

A. Now, Mr. MacIntyre, I testified yesterday exactly who was at that meeting, and there were four people there. Mr. Bernhart Stroh was not. That dinner, I mean, pardon me.

Q. Mr. Bernhart Stroh was not there?

A. No.

Q. Were any of the other Strohs connected with the Wabash Portland Cement Company present?

A. Again, let me say that there were four people at that meeting.

Q. What about Mr. Rooney of the Huron Portland Cement Company, was he there?

A. At that dinner he was not.

Q. What about Mr. Harry Lucas, of the Petoskey Portland Cement Company,—are you positive he was not there?

A. I am positive. We sat in the middle of the
30326 main dining room around a table, four people were there, there, here and here (indicating). That is all that was there.

Q. Can you say you attended any meeting in the Book-Cadillac Hotel when those men were not present with Mr. Johnson in July, during 1936?

A. Now, in the first place, Mr. Johnson and I did not have any meeting. We had a dinner with those two men I mentioned. Now, while Mr. Johnson was out there, I think it was that trip that Mr. Bernhart Stroh came down one morning for an hour or two. No, we probably spent 30 minutes with him one day, and the time was spent sitting in a few chairs out in the lobby of the Book-Cadillac Hotel. I believe it was that trip. I remember once he came down and met us there.

By Mr. MacIntyre:

Q. Did Mr. Rooney meet you there at any time?

A. He did not.

30327 Q. What about Mr. Harry Lucas, of the Petoskey Company?

A. Did not see him.

Q. Mr. S. D. Crapo, of the Huron Company?

A. No.

Q. He did not meet with Mr. Johnson at the Book-Cadillac?

A. He did not.

Q. What about Mr. A. C. Conkrite, of the Universal Company?

A. What about him? What do you want to know about him?

Q. I am asking you if he met you and Mr. Johnson at the Book-Cadillac?

A. No, he did not.

Q. Or any other place at that time for the purpose of discussing Mr. Cree?

A. No, sir; he did not.

Q. Or any other subject?

A. No, I did not see Arch Conkrite.

Q. What about Mr. F. L. Stone, of the Universal, did he meet you?

A. He did not.

Q. You are positive as to all those?

A. Yes, sir. I am positive to every one of them.

Q. Do you recall a letter that you wrote Mr. Johnson shortly after you came with the Aetna Portland Cement Company in which you told him that judging from what Mr. Bernhart Stroh had written in a letter that you
30328 gathered that Mr. Stroh considered you as God's gift from heaven. Do you recall that?

A. Yes, he seemed to think that I could take this cement plant that they had messed up, and make a lot of money out of it in about 10 minutes, and I was trying to tell Mr. Johnson to please disabuse his mind of any such silly ideas, and if you read the rest of the letter you will see that is what is in there. Now, you read one paragraph out of it, and twist the letter around. I was trying to tell Mr. Johnson to calm this fellow down; that I could not do anything like he expected me to do. I told Johnson when I took this job it would take me five years to straighten out this mess that they left up there.

Q. You did not agree with Mr. Stroh in that connection that you were God's gift from heaven in this connection?

A. Now, are you just kidding me or are you asking me —are you kidding me, or do you want me to answer that question?

Q. I am asking you a question.

Trial Examiner Norwood: Well, I think he stated that he did not agree with Mr. Stroh.

The Witness: Come on, let's get down to the facts of this case. I want to get an airplane back home.

By Mr. MacIntyre:

Q. I would still like an answer to the question.

The Witness: Let's hear it.

Trial Examiner Norwood: Read it.

30329 (Question read.)

A. No, the answer is "No."

By Mr. MacIntyre:

Q. That is, even though you did continue the same practice in the industry that you had carried on with the Consolidated Company?

A. Now, then, you want to put those words in my mouth again. I just got through testifying the changes I made. Why should I testify to the changes and you turn around and put them the same—

Q. I gave you an opportunity to tell us about all those changes, and then we—

A. I did my best.

Q. —and then we, of course, considered that you carried on the other practices except for those changes, so I am now going back to the practices that you did not change.

A. Will you please ask me a plain direct question and I will do my best to give you a plain direct answer.

Q. Well, although you did continue the practices with the Aetna Company that you had continued with the Consolidated Company with the exception you have now, you did not consider that you were the God's gift from heaven, as Mr. Stroh considered you?

A. It seems that you are pretty anxious to get that God's gift from heaven stuff all over the record; aren't you?

30330 Q. Will you please answer the question.

A. Well, in the first place, I probably did not continue all the practices. Now, we were talking about policies a while ago, now you got the word "practices" in there. I do not know. The only way I can answer that kind of a question is that I do not know.

Q. All right.

We have talked considerably about trucking rates here, Mr. Calvin, and you have told us what you considered to be the correct rates between certain points. Will you please tell me now what the correct trucking rate is that you pay from Bay City to Grand Haven?

A. At what time do you want to know about that? The rates change every once in a while in Michigan.

Q. Well, you have stated that, on the face of the record, that the rate shown between those points on Respondents' Exhibit 1975 is a correct rate. Now, you can just tell me about the time that that rate, that is shown on there, applies, and what the rate is, if you please.

A. To the best of my recollection, that is the rate applied.

Q. When?

A. I am going to tell you when. I said applied, that is, not a complete sentence. I will complete the sentence.

At the time that I was making up my mind as to whether or not it was a practical and sound proposition to
30331 continue that Grand Haven warehouse, or if it would be more economical to close the warehouse up and truck my cement over there; and if I remember correctly at that time I was paying about 46 cents' freight rate across there.

Q. When was that?

A. When I closed the warehouse.

Q. Well, when was that?

A. I think that I closed that warehouse some time during the spring of 1937.

Q. During the spring of 1937?

A. Now, I can tell you about how we are handling these rates now. We are paying these fellows on the long haul freight rates.

Q. What is the rate today between Bay City and Grand Haven?

A. The same as the freight rate.

Q. What is that?

A. I do not know. I think probably it is about 46 cents plus 4 cents. It is probably about 50 cents.

Q. About 50 cents?

A. That is right, right now.

Q. Are you positive it is fifty?

A. I said "I think." I am not sure. That is just what I got through telling you.

Q. What about the rate Bay City to Port Huron, can you tell me what that is—that is, the trucking rate?

30332 A. They made some little changes in some of these rates lately, either 32 went to 34, or it was 34 and went to 36.

Q. Well, can you tell me what it is?

A. I think right now that I am paying 36 cents over there.

Q. Are you sure of that?

A. I told you that I thought. That is my best recollection at the present time.

Q. Well, I am asking you if you are positive that that is.

A. And I answered you to the best of my ability.

Trial Examiner Norwood: I think he stated his degree of certainty there.

By Mr. MacIntyre:

Q. What about your rate from Bay City to Toledo,—what is it today, the trucking rate?

A. They got an Interstate Commerce Commission ruling down there which might have changed that rate right now, but at the time that we did most of our trucking down in there, we get practically no business in Toledo right now. I think it was about 46 or 48 cents.

Q. About how much?

Mr. MacIntyre: Will you read that answer?

A. Forty-six or forty-eight cents.

Q. And in what units are these rates, trucking rates, appearing on Respondents' Exhibit 1975 made,—are they hundred pounds, barrels, or what?

30333 A. Barrels.

Q. In barrels?

A. Yes, sir.

Q. And the rates you have been giving me in your answer are expressed in terms of barrels, also?

A. That is true.

Q. Well, Mr. Calvin, yesterday, or the day before yesterday, on voir dire, it was on the 9th, on voir dire you told me that the rates as you saw them on this exhibit—that is, 1975—were the correct rates.

A. Yes, sir.

Q. Well, there appears on that exhibit the Toledo rate is 44. You tell me now it is 46 or 48.

A. I told you I thought it was; when you handed me that before I had that sheet to refresh my memory. Let me see it again and I will answer your question.

Q. You told me you had not seen this sheet prior to the time Counsel handed it to you in the hearing room. How did you then come to the conclusion that that was the correct rate as shown here, and yet today you are not positive that it is—whether it is 46 or 48?

A. You write the rates down on a piece of paper and you refresh my memory, and I will take a look and tell you.

Q. If I had written down 46 or 48, and handed it to you and asked you if that was the trucking rate to Toledo,
30334 what would be your answer?

A. You see, when a person that handles these rates sees a group of them, you get some pattern as to rates.

Mr. Withrow: What is that exhibit number, Mr. MacIntyre, you are referring to?

Mr. MacIntyre: 1975.

By Mr. MacIntyre:

Q. I show you a piece of paper on which I have written rates opposite the words "Detroit, Toledo, Grand Haven, and Port Huron."

Mr. Withrow: Could we have the document marked before it is shown to the witness?

Mr. MacIntyre: Will you mark it, please, for identification, as Commission's exhibit?

(The document referred to was marked for identification "Commission's Exhibit 3240.")

By Mr. MacIntyre:

Q. Would you say that they are the correct trucking rates today in the order that they are shown—that is, Detroit, Toledo, Grand Haven, and Port Huron, from Bay City?

Mr. Withrow: I object on the ground it is immaterial to any of the issues. It is wasting time here. Counsel for the Commission offered to stipulate about tabulations of rates which Counsel and the witness would vouch for. Such a document was offered in evidence. Counsel
30335 now apparently is going back on the theory beyond his proposition of saving time.

Mr. MacIntyre: We did not waive any cross-examination on them.

Trial Examiner Norwood: No. The objection is overruled.

By Mr. MacIntyre:

Q. Will you please tell me whether or not the rates as shown on this Commissions' exhibit, for identification, 3240, are the correct rates to those points—that is, Detroit, Toledo, Grand Haven, Port Huron from Bay City,—trucking rates per barrel?

A. You mean if that is what I pay?

Q. That is, you consider as the correct rates.

A. You mean as to what I am paying?

Q. Well, you looked at a set of rates on a sheet of paper the other day handed to you in a manner similar to this, and you said they were the correct rates. Now, I am showing you this sheet and asking you whether or not the rates that appear thereon are the correct rates.

Mr. Withrow: I object on the ground it is wasting time, and on the further ground it misstates the record. The witness testified that the figures were the cost of trucking cement and not the correct rates, or any such phraseology, and he can testify what his cost was.

Trial Examiner Norwood: The objection is overruled.

30336 Answer the question.

The Witness: Will you read the question?

(Question read.)

A. I do not think these are the correc' rates.

By Mr. MacIntyre:

Q. Well, what are the correct rates if those are not?

A. Now, we are right back where we were.

Trial Examiner Norwood: Well, do you know or do you not know?

The Witness: I explained to him a minute ago, as nearly as I could, what the rates were to those points, and I gave them approximately what they were. Now, he is just taking the rates off that sheet, and juggling them up a little bit.

By Mr. MacIntyre:

Q. The names of the cities appear in the same order that they appeared on Respondents' Exhibit 1975.

Mr. Withrow: I object to that. That is wasting time.

By Mr. MacIntyre:

Q. So I am asking you now whether or not the rates appearing in the same order, that you can tell if they are correct as they appear on this sheet, Commission's Exhibit, for identification, 3240, is any more so that you can tell, or as much that you can tell the rates appear-

30337 ing in the same order on Respondents' Exhibit 1975 are correct?

A. Well—

Mr. Withrow: I object to the question as immaterial.

I think it is also not understandable. I do not know what is in the same order, the rates in the same order, or the cities in the same order.

Trial Examiner Norwood: The objection is overruled.

The Witness: Now, what do you propose to do here, please, sir?

By Mr. MacIntyre:

Q. I am testing your knowledge of these rates.

A. I understand that. What do you want me to answer now?

Q. I would like for you to tell me whether or not you consider the rates shown on Commission's Exhibit, for identification, 3240, are correct trucking rates or trucking costs per barrel from Bay City to Detroit, Toledo, Grand Haven, and Port Huron?

Mr. Withrow: He has answered that once and said he did not think they were.

Trial Examiner Norwood: Now, Counsel has objected once.

A. I think that the rate of Port Huron is correct.

By Mr. MacIntyre:

Q. Port Huron is a correct rate, 34 cents?

A. Although I told you that there had been some
30338 changes made in there. We paid 32, and it went to 34, or 34 went to 36.

Q. You think 34 is the correct rate?

A. Yes, I think that is what we are paying now, but it seems to me a year or so ago I used to get by over there with 32 cents.

Q. What about Grand Haven?

A. I told you I thought your rate was about 46 cents probably gone up. You see you had a 10 per cent increase in freight rates, and these truckers came in to us and they petitioned and they begged us to spring our rates up, and I expect we sprung it up over there about like this.

Q. Well, what is it?

A. Probably around 50 cents now.

Q. What about the Toledo rate?

A. Although I think at one time we were getting into Grand Haven at about 48 cents.

Q. What about the Toledo rate?

A. It seems to me that you missed that a couple of cents. It it about 48.

Q. You think it is 48 cents?
A. Yes.
Q. What about the Detroit rate?
A. We have gone in there for different rates. I think we have gone in there now for 42 cents.
Q. You think you are getting in there for 42?
30339 A. Yes.

Mr. MacIntyre: Your Honor please, we now move to strike from the record Respondents' Exhibit 1975. It shows the witness does not know them to be correct rates. The testimony on cross has not given a single one of them from his best knowledge and recollection as being the rates shown on Respondents' exhibit.

Mr. Withrow: Before Your Honor rules, I would like to point out one thing, that the witness is now being asked what the current rate is between these points, and the witness testified that the rates appearing on 1975 were the rates which were in effect at the time he was considering discontinuing the warehouse. In the absence of no showing that the rates have not changed, and the witness has testified they have, I do not see that this testimony has in any way affected the exhibit.

Mr. MacIntyre: Your Honor, that piece of paper Mr. Withrow handed the witness, and which the witness said he had not seen before Mr. Withrow handed him in here, carries certain information with a caption purporting to be certain rates.

The witness now on cross-examination, as you will observe in comparing the two sheets of paper with the record of his testimony on cross,—and I ask you if you care to do so, to reserve your ruling on my motion until
30340 after you have read it. You will find, after doing so, that his testimony is not only confusing but it makes the record very unreliable to receive what has been received in evidence upon offers of the Respondents in that connection.

Trial Examiner Norwood: Well, I shall reserve the ruling on this until I can read his previous testimony and this, and I will retain Respondents' Exhibit 1975 and also Commission's Exhibit 3240, for identification.

Mr. MacIntyre: I offered no objection to Respondents' Exhibit 1975 when it was received, because the witness' testimony on voir dire was that he was positive the rates were the correct rates.

Trial Examiner Norwood: Well, I shall look that over.

By Mr. MacIntyre:

Q. Mr. Calvin, in your shipments of cement by truck, that is, for truck delivery, if the record is not clear I would like for you to make it clear as to what basis of pricing that you used—is it a delivered price basis on all of your shipments that the customer pays?

A. Yes, we are selling cement on a delivered-price basis.

Q. Did you or have you since you have been with the Aetna Company quoted the customer on any other
30341 than a delivered-price basis when trucks were used to transport the cement from the plant?

A. Not that I recall.

Q. And how is that delivered price calculated that you used in that connection?

A. Oh, I calculate that price the same way no matter how I am going to deliver it.

Q. Well, how is it calculated?

A. Well, now, you take for instance when we have that flat price proposition in Michigan, there is no calculation to it as far as I was concerned. I was meeting competition. If somebody quoted a $2 price, I met the competition; if it is a $1.90 price in the Detroit area quoted I meet that competition.

30344 Q. Now, since this is not the flat price, the same price for each point throughout the State of Michigan, how did you determine what price applied at each of those points, Mr. Calvin? That is, the points and the prices shown for the points on Respondents' Exhibit 1982?

A. Well, you determine this by information which you get from salesmen, from customers; you try to establish,—you try to work out a pattern to see what is going on.

Q. What kind of pattern?

30345 A. Well, a price pattern.

Q. Well, what kind of price pattern? I want to know what shape the pattern takes.

A. Well, you check it back to see if somebody is quoting consistently on some mill base price, so-called, or what they are doing, and you do that by getting out your freight rates and finding the quotations, and figure them back to a common point, and you develop a structure. If you have been in the cement business 10 or 15 years you can find out pretty quick what is going on.

Q. Then you apply your pattern to all points in the State in making up the prices such as appear on that Respondents' Exhibit 1982?

A. Yes, that is the way this is made.

Q. With respect to truck deliveries and rail deliveries, then, the delivered price quotations that appear on Exhibit 1982 would be the same?

A. Sir?

Q. With respect to either truck or rail; is that correct?

A. We computed our prices here on published freight rates.

Q. For either truck or rail delivery?

A. Computed the price, yes, on the published freight rate, and in most instances in Michigan, the lower peninsula of Michigan, the customer may have this cement delivered to him either in cars or in trucks.

30346 Q. Or barges or boats?

A. No, we do not—

Trial Examiner Norwood: He has told us a good many times here—

A. I do not hold out any—

Trial Examiner Norwood: —he charged a delivered price.

The Witness: I do not hold out any proposition to the customers about delivered by boat at all. I might, but I do not quote that way.

By Mr. MacIntyre:

Q. Now, will you please tell us about the freight rates that you used in connection with the base price in making up a list price, which is appearing on Respondents' Exhibit 1982,—from what sources do you get those freight rates?

A. Well, now, at the present time, in our office—you had that sheet here in evidence the other day—we have a master sheet covering, as completely as we can, every town in our territory where we think we will ever get any business, or we solicit, and on that sheet we have got the freight rate reduced to barrels, cents per barrel. Now, when I quote I use those freight rates that we have already compiled, and have there in that sheet.

Q. I am asking you, though, Mr. Calvin, what are the sources of your freight rates?

30347 A. No, I don't think you asked the source. You asked where I got them. That is two questions. If I answer one—I am trying to answer your questions the way you ask them.

Q. I am sorry. I am sorry I did not make it perfectly clear.

I will ask you, what are the sources?

A. Well, of course, the primary source is probably the tariff published by—what is it, the Interstate Commerce Commission, or whoever publishes tariffs; I do not know enough about tariffs to know who publishes them.

Q. You use those?

A. We use those.

Q. In making up your prices?

A. We use those in our general course of business.

Q. To what use, if any, do you put the freight rate books of The Cement Institute?

A. We use them also.

Q. How do you use both of them?

A. Well, we could very easily use some of the tariffs. When we did not have the other freight rate book—I have already testified when I came with the company, we did not have any. You asked me what my source was. I said the original source was the tariffs, as published.

Now, generally speaking, at the present time, we are using The Cement Institute freight rate book; that 30348 is why I joined the Institute, to get that service; it is a very easy facile matter to handle. I use those most of the time.

Q. That is in making up prices which appear on Respondents' Exhibit 1982?

A. Let's get this straight. I have got that sheet in my master book, and my clerks in the department back there have been cautioned to get those rates absolutely right, and to check them from every source, and we use those as standard rates that are in my book. Now, those rates may have come from the Institute freight rate books, or may have been checked at the tariffs, or vice versa, and they are in there now as ours, and that is what we use to compute prices now.

Q. If you check the rates from The Cement Institute freight rate books with the tariffs and find that there is some change, which ones would you use?

A. Well, the first thing I would do, go back to the

railroad and tell them to double-check the proposition; since the railroad people are the fellows who charge us, and we have to pay them, I would more than likely take their word for it.

30350 Q. Mr. Calvin, you have testified that in working out the freight rates that you used in calculating your delivered prices, such as are shown on Respondent's Exhibit 1892, you take the freight rate books of The Cement Institute and check those rates with the official tariffs and use those in the official tariff for the checking; is that correct?

A. I do not think I testified to that, did I, Mr. MacIntyre?

Q. That is my understanding.

A. I believe you are mixed up. If you want to, I will go over it again and tell you what we do.

Q. All right, tell us what you do, if that is not

30351 correct. That is my understanding of it.

A. I have got some clerks in the shipping department, and I provided them with those master sheets, and there is a place on that sheet showing freight rates in barrels. I have tried to give those clerks the advantage of all the information that I could get, or tell them how to get, from any source, whether it is the freight rate books or tariffs, and to make those figures on that master sheet correct. Now, then, I cannot personally take the time to check and double-check. They have been told to check this information from every source. Now, at the present time we consider the most convenient and the easiest tariff that we have, or set of rates to handle, are those provided or published, or compiled, or whatever you want to call it, by The Cement Institute, and they use those, but they have been cautioned and instructed to check artes where there is any doubt, and to see that they keep our books which we use from day to day correct.

Q. According to the railroad tariffs?

A. Correct. Oh, sure, the railroad tariffs.

Trial Examiner Norwood: Where the tariffs and the Institute books disagree, which do you take?

The Witness: Why, I would be very much inclined to take the railroad's. It is their business, and I tell them to go check those and establish the fact whether they are right or wrong.

30352 Trial Examiner Norwood: And do you take the railroad rate in making out such price list?

The Witness: Oh, certainly, and we occasionally find the rate wrong. We change. He has got some changes made on there. Perhaps that is why they are made, I don't know.

By Mr. MacIntyre:

Q. Now, referring to those changes, Mr. Calvin, the one appearing on Exhibit 1982-A opposite Buena Vista, rate $2.18, change to $2.10. Can you tell us whether or not the $2.18 resulted from a rate taken from the freight rate books and 10 cents correction later made to coincide with rates found in the official tariffs?

A. Why, certainly. I cannot tell you that now.

Q. Well, what is your best thought on it as to the cause of the $2.10 price going into—

A. Now, that is altogether different. I told you
30353 what I thought the cause was, and I cannot tell you about that for sure, but I do remember recently up in the northern part of Michigan there have been some railroads abandoned, and that—no rates apply to them, and we have adopted the custom in some sections of giving those towns off of the railroad the same price as their nearest competitor has over in the town on the railroad, and I think, too, Mr. MacIntyre,—I am not sure,—this looks like one of those towns, and I explained all of this to you yesterday.

Q. So you do what your competitors did in that respect, then?

A. I do not know what the competitors did. I told you what I did.

Trial Examiner Norwood: Didn't they do the same thing?

The Witness: I would have to check that down to see, and I could go up there and ask that dealer.

By Mr. MacIntyre:

Q. You have no recollection on that point now?

A. Yes, I have got this recollection. Here is what I think happened. He went up there, and my salesman told me our price was out of line. I asked the salesman to find what price they had quoted by competition in there, and I think I met those competitive prices as found by the salesman in the field.

30356 Q. Mr. Calvin, I would like to call your attention to Respondents' Exhibit 1971-A, B, and C. Can you

tell me what is included in the item "bin cost" on gray cement that appears there?

A. I can probably give you roughly what is included in that.

Q. All right.

A. Well, the raw material cost, clay, stone, gypsum, the cost of coal, labor—different items of that nature.

Q. Factory administrative expenses? Are the administrative expenses of the factory included?

A. Now, Mr. MacIntyre, very frankly it is very easy to get confused in the terms that you use and I use about what administrative expense is and what is not,—and bin cost is one of the most confused terms that I know of in the industry.

Now, actually, in our computation of bin cost, to the best of my knowledge, we do not include our office general administrative expenses.

30367 Q. Anything in there that would be under that item that would include any part of your salary?

A. No. The way we keep books, I do not believe it does. I do not think so.

Q. To what item in the operation of your company is your salary charged?

30368 A. To the best of my knowledge, they charge my salary to general and administrative expenses.

Q. Well, is any part of that allocated to the warehouse operation administration in any respect?

A. Just a minute. You said "warehouse operation administration." That is two different things.

Q. The administration of the warehouse operation. Is any part of your administrative expense to which your salary is charged allocated to that operation?

A. Not on that sheet.

Q. Well, I am trying to determine whether or not it is so allocated.

A. I said not on that sheet. You see, you have gross profit or gross loss shown on that sheet.

Q. Yes.

Trial Examiner Norwood: No part of your salary is included in those costs—included in any computations that would determine whether or not the warehouses were profitable?

The Witness: Oh, yes, yes. Yes. You got another step to go. Here—

By Mr. MacIntyre:

30369 Q. Let us know where it is.

A. Well, that shows gross profit or gross loss.

Q. Yes.

A. Now, in order to get a net profit or a net loss there are certain other expenses about a company that must be either added or detracted from that. If that is a net loss, I hayen't got any sales expenses, no G and A expense, and it is even greater. That goes on top of those figures. That shows a loss. When you put G and A expenses there, and sales expense, you get still a greater loss.

Q. What is your sales expense per barrel?

A. I can't tell you what my selling expense is.

Q. As to these nine or ten salesmen that you told Mr. Withrow on direct examination that you employ, what is the salary paid to those people?

A. I pay those salesmen different salaries.

30388 Q. What were the dates or the period over which you and Mr. Harry Lucas, of the Petoskey Company, served on this committee of The Cement Institute?

A. Well, since that committee that your refer to 30389 never met, did not perform any service that I can imagine, never did a thing in the world, I do not see how you could ask me to spread that activity of which there was none over any period of time.

Q. Is it correct, then, that we are to understand from you that the committee of which you were a member was inert, inactive, never functioned?

A. Correct.

30390 *Redirect Examination by Mr. Withrow.*

Q. Mr. Calvin, on cross-examination Mr. MacIntyre asked you whether you had talked to your attorneys about this case. Do you recall that testimony?

A. I recall that he asked me.

Q. You told him that in addition to those certain questions were put to you which you answered, and that the interview was taken down by a stenographer in your office; is that correct?

A. That is correct.

Q. When you said that statements were taken down by a stenographer in your office, did you mean that that was the

place where the interview took place or that the stenographer was employed in your office?

A. That is where the interview took place. That stenographer was brought there.

Trial Examiner Norwood: I will be glad in this examination if you will not lead him.

By Mr. Withrow:

30391 Q. Would you tell us whether or not, Mr. Calvin, that stenographer was employed by the Aetna Company or by the attorneys who talked with you?

A. She was in the employ of the attorneys.

Q. You also told Mr. MacIntyre that your answers to your attorneys' questions, after they were written up, were subsequently forwarded to you by mail.

A. That is right.

Q. Now, Mr. MacIntyre asked you whether any changes were made in your answers, and you told him that some changes may have been made. Could you tell us who made those changes?

A. When that came back to me I checked over the answers and made some changes in them myself.

Q. Did anyone other than yourself ever correct or change any of your answers?

A. No.

Mr. MacIntyre: I object. That is leading. He could have asked him whether or not any other changes were made than those he just described.

Mr. Withrow: I will adopt Mr. MacIntyre's suggestion.

Mr. MacIntyre: The harm is done.

Trial Examiner Norwood: He may answer that. Go ahead.

A. No.

30392 By Mr. Withrow:

Q. How long before you took the witness stand was it that you last saw and examined into this typewritten interview?

A. To the best of my recollection, it was when the carbon, or a copy was sent to me to check over and make whatever corrections I saw fit to make, and I think that was early in December, and I have not been fooling around with this since then.

Q. Now, before taking the witness stand to testify in this case, would you tell us whether or not you were shown

this typewritten statement, and whether you referred to it in any way for the purpose of refreshing your recollection or giving testimony?

Mr. Paulson: That is indefinite, "before."

He has already answered that.

Trial Examiner Norwood: Let him answer.

Mr. Paulson: He has already answered that particular question, because he said the document was sent back to him from New York, and he saw it; that is before. "Before" is a long time, as a matter of fact it is a very long time.

The Witness: Shall I answer it?

Trial Examiner Norwood: The objection is overruled. Answer the question.

A. To my best recollection, the last time I saw
30393 that was some time early in December.

By Mr. Withrow:

Q. That was soon after the interview, was it?

A. That is right.

Q. And did you examine it? Would you tell us whether or not you examined it at that time for the purpose of refreshing your recollection?

A. Well, I examined it at that time for the purpose to see if the answers in there were according to the facts as I thought they existed or had existed.

Mr. MacIntyre: I will have to ask, if your Honor please, that you instruct Counsel not to lead.

Trial Examiner Norwood: I told him once not to lead.

Mr. MacIntyre: It is harmful, once the question is out; he can ask another question, of course, but the witness knows, then, what he is expected to give in the way of an answer.

Trial Examiner Norwood: Yes. If you put an answer in his mouth I am going to rule out any further examination on that.

Mr. Withrow: Oh, I am through with that, Your Honor.

30394 Q. Mr. Calvin, I will show you Respondents' Exhibit 1983, for identification, and ask you to tell us if this is one of the record pages of that master book which you referred to as containing the freight rate information and other information?

A. Yes, sir; that is one of the sheets out of our book.

Q. And that is the sheet you were referring to in
30395 answer to Mr. MacIntyre's questions?

A. That is right.

Q. Mr. Calvin, you said—you testified, on both direct and cross, about an attempt to increase the price in December, 1936, and do you recall what the increase in base would have amounted to at your Bay City mill?

A. Ten cents.

Q. And I believe you testified that before the increase that was $1.40, is that correct?

A. Yes, I think that is right, in that neighborhood.

Q. So that you were attempting an increase which would reflect at the base $1.50?

A. Yes, that is right.

Q. Mr. MacIntyre asked you to compute the price at Bay City, Mich., figured on a base of $1.40. Would you tell us whether or not at the time Huron announced its flat price in Michigan, whether your announced quotations were in fact computed on $1.50?

A. Yes, they were. They were $1.50 at that time.

Q. And would you compute for the Examiner what the delivered price would have been in Bay City as you announce it?

A. If we used that 27-cent freight rate the same as we used before.

Q. For cloth delivery.

A. This pen is dry. Let me have a pencil.
30396 (The witness figures on a piece of paper.)

A. That would be $2.17.

Q. And the flat price announced by the Huron Company was how much?

A. $2.10, both in cloth figures.

30397 *Recross-Examination by Mr. MacIntyre.*

Q. Mr. Calvin, you told Mr. Withrow on redirect that the last time you saw these questions and answers—that is, the notes that were taken down by your Counsel's
30398 stenographer in your office, and as they had been revised by someone finally, was during December, 1939; is that correct?

A. I think I testified that the last time I saw and examined them was then. Now, I have also testified on the record that those were laying on my bureau in my bedroom

so I would not forget to bring them along when I packed my bag. I put them in my bag. I brought them here and took them out of my bag. I have seen the things from the outside, but I have not gone into them and looked them over since that time in December, or whenever it was.

Q. It was during December?

A. The early part of December, sir.

Q. Why did you bring them with you?

A. Well, they did not belong to me in the first place, and I brought them along.

Q. For what purpose?

A. That perhaps the attorneys would want them back. They belonged to them.

Q. Have they asked you for them?

A. They have them now.

Q. You knew when you did examine them here in December—that is, the time you told Mr. Withrow you examined them—you were to testify in this case and on the subjects of those questions and answers, didn't you?

A. I did not know whether I would testify or not,
30399 but I had a very strong impression that I probably would.

Q. Yes, you had been told you would.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: You are excused, Mr. Calvin.

HARRIS N. SYNDER, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Withrow.

I am vice-president and treasurer of the Federal Portland Cement Company, and have held that position, since, I believe, January 1938. Before January 1938 I was secretary and treasurer. I became secretary and
treasurer upon the organization of the company in
30400 1926. I am a member of the Board of Directors.

My duties are, I think, the usual duties of a treasurer and the general management of the business. I do not determine the sales policies of Federal. The sales manager determines the sales policy. He consults me about these matters.

Federal started to produce cement in the spring of

1927. When Federal began to market cement, I did not have anything to do with determining what policy should be used in marketing cement. I am not a stock-
30401 holder in the Federal Company. I have never been a stockholder in any cement producing company. I am a director of the Bessemer Securities Company, and that company holds stock in the Federal Company. The Federal Company does not own stock in any cement producing company.

30420 Buffalo is the location of the Federal Company's
30422 mill. Federal was built in 1926 and '27. Since that
30426 time, the major improvements have consisted of air separators, unit coal mill, covered clinker storage, and some minor ones; but those are the principal ones that have thus far been undertaken. Others are under contract that are not completed. There are two main reasons why these improvements are made: one is the changing specification on quality of cement required some of these changes, and then others are made for the purpose of reduction of cost. In recent years we have had to manufacture new types of Portland cement.

30428 By Mr. Withrow:

Q. In your opinion, Mr. Snyder, is your mill an antequated and inefficient mill?

A. No.

Q. Do you consider it to be an economic unit?

30429 A. Yes.

Q. Now, you testified that the Federal Portland Cement Company was reorganized. Would you tell us whether or not it went in bankruptcy prior to the reorganization?

A. It was reorganized under 77(b) of the bankruptcy laws.

Q. Would you tell us how you reconcile your statement that you know that it is an economical mill or an economical unit in view of the fact that you went through a reorganization?

Mr. Paulson: We would like an objection to that.

A. I do not think the one follows the other at all. And you bear in mind that this plant went into operation in 1927, and you know that the depression came on in the year 1929. Now, it did not immediately affect our
30430 cement business, that is, volume stayed up for a matter of a year after that time, but that is a rela-

tively short time to build up any backlog in the way of finances; and, as is quite customary—I would not say customary, but is frequently found that estimates of the cost of building a plant are greatly exceeded, and that was the case in our particular company; so that we were not fat when we started up, and so that our fat was very quickly exhausted, and about at the same time the price of cement in our district went down to a very low point, and we had a bond issue outstanding, and we tried to keep our mortgage in shape, and used our funds for that particular purpose.

Trial Examiner Norwood: Now, what time was that?

The Witness: That was in the year 1930 and 1931. I think we—I think we suspended operations at the plant in 1931 and were shut down for a couple of years.

By Mr. Withrow:

Q. Was the Federal mill the first cement mill at Buffalo?

A. It was the first one to go in operation, if you disregard the mills of a great many years ago making natural cement, or one cement that was made there many years ago out of blast furnace slag, which did not classify as a Portland cement.

Q. And after you went into operation did any other cement mills or silos ever come into operation around Buffalo?

A. Yes. The Great Lakes Portland Cement Company plant went into operation probably within a month
30431 or two of the time our plant went into operation, and shortly thereafter silos were built at Buffalo by the Huron Portland Cement Company.

30437 Washington, D. C.,
January 16, 1940.

30438 In regard to the motion of Counsel for the Commission, which appears at record 30339, this motion was to strike Respondents' Exhibit 1975,—and did that include the testimony at record 29989, lines 24 and 25, and 29990, lines 1 to 7?

Mr. McIntyre: If Your Honor please, it would include the testimony that related to this exhibit, and some ad-

ditional testimony that was given earlier before the exhibit was offered.

I have not as yet been able to get to you the specific reference to the pages and lines that I had intended to include in a further motion to strike. The motion as it stands now, of course, was to the exhibit as well as the testimony that related to the exhibit itself.

Trial Examiner Norwood: From my study of it, I think the exhibit contains everything as appears in the record as to those particular rates, except the cross-
30439 examination, and no positive rates were stated there; so it will meet all purposes if the exhibit were struck.

Now, I have studied the witness' testimony from pages 30331 to 30339, and it appears from my study of the record that the witness testified to these rates solely on account of the confidence he had in his Counsel, and that when he was cross-examined it showed that he did not know a single one of those rates, and I do not think that this is the paper which he properly used to refresh his recollection, anyway.

So I shall allow the motion to strike Respondents' Exhibit 1975.

30447 J. E. BATES, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Wuhrow.

I am associated with the Federal Portland Cement
30448 Company, Inc. I am sales manager, and have held that position since August of 1933. I have never held any other office in the Federal company. I had experience in the cement business prior to August, 1933. I started in 1924 with Bessemer Limestone & Cement Company. That merged with Bessemer Cement Corporation about 1927, I believe, when they took under their management the Federal plant, and I was employed by the Bessemer Cement Corporation until July 1933. I was located from July 1927 to July 1933 at Buffalo. The Federal Portland Cement Company manufactured cement at Buffalo during that period from July 1927 to July
30449 1933. Sales were handled by the Bessemer Cement Corporation until 1933. During that period the

Federal Company was only a producing company.
30450 The Federal Company, which now markets cement,
is the same corporation which used to produce for
the Bessemer Cement Corporation. When I was district
sales manager for the Bessemer Cement Corporation, Bes-
semer marketed cement only in New York State. Federal
became a marketing company in August or September of
1933 when we organized our present sales force. The
Bessemer Cement Corporation, who were the marketing
agent for the Federal Portland Cement Company,
30451 was dissolved, and of course we decided at that
time to go into the field ourselves. Federal's main
office is at Buffalo, and the company is incorporated in
New York State. We do not have any branch office. We
are not affiliated in any way with any other cement manu-
facturing company at the present time. I am not a mem-
ber of the board of directors of any other cement com-
pany. Mr. L. A. Beeghly, is our president, and Mr. H. N.
Snyder is our vice president and treasurer; Mr. W. E.
Bliss is vice president. Mr. R. E. Daniels is the
30456 secretary and assistant treasurer. Mr. H. N. Sny-
der is the chief executive officer of Federal, and has
been chief executive officer of the company since I became
affiliated with Federal. I would say he was the chief
executive officer at the Federal plant even before he
30457 became president. I would say that now he is in
charge of the operation end of the business. He
has the last word on any—I determine the general sales
policy of Federal. The president and the other vice presi-
dent, Mr. Bliss, are not active in the management of the
company at all. Prior to the time that Mr. Snyder became
chief executive officer of Federal, I received instructions
from Mr. Charles Schmutz. This was before Federal be-
gan to market its own cement.

30459 The witness identified Resp. Ex. 2061 as an an-
nouncement, dated November 27, 1933, to the trade
that Federal was going to merchandise their own brand of
cement. This announcement was issued in the regular
course of their business.

30460 (Resp. EX. 2061 was offered and received in evi-
dence.)

30461 At the present time Federal has one mill located
in Buffalo, New York. It is in Erie County, town of
30483 Hamburg. The original rated capacity of Federal

was 1,250,000 barrels. Today it is the same. There has been no increase in the capacity of the mill. That, to me, is probably a theoretical engineering figure. They take and base your kiln production, how much your kiln can produce, the number of kilns you have, and the number of days that you operate those kilns in a normal 12 months period, and then they come out with a figure and say your production is at the production rate of 1,250,000 barrels. I doubt very much if our plant could produce that much in 12 months.

Q. Has Mr. Mallory, of The Cement Institute, 30484 ever told you what the capacity of your mill should be?

A. No, sir.

Q. Would you tell us whether or not there has been any restriction of production in accordance with any agreement based on Mr. Mallory's production figures?

A. No.

There have been improvements and changes in our mill since it was originally constructed in 1925 to 1927. We are continually improving the plant. We have no warehouse or silo or other distributing point other than our mill. Our finished storage capacity is about 177,000 barrels. We have 100,000 barrels clinker capacity. I am sorry to say we shut down our plant during some months of the year. I would say, since we started that plant in 1933, that our shut downs average about 3 30485 months in the year. We shut down those 3 months of the year (because) we do not have the business to continue the operation. We have tried in the past to operate both mills at the same time. I think the last year we operated two kilns was in the year 1938, and I think that was only for the period of a month. In 1937 I would say we operated it around 40% of capacity.

Q. And how does that compare with the percentage of operation during the preceding year, since the Federal was marketing cement?

A. Well, it would run from about 33⅓ to 45 per cent, I imagine,—our best year."

Our shipments fluctuate from month to month, especially in our section of the country. In Buffalo we are considered up in the north country. We have just heaps of snow, and, of course, at this time of the year up there our shipments are very sparse. When the weather gets bet-

ter, of course, our shipments will climb. I think that
30486 answers your question. We have to have storage space at our mill as the result of these seasonal variations in demand.

Q. And does this storage space cost any money to the Federal Company?

Mr. Paulson: May we have an objection to the question, as well as those others?

Trial Examiner Norwood: What do you want to show by this?

Mr. Paulson: Which go to the cost of manufacture.

Mr. Withrow: This all has a bearing, Your Honor—

Trial Examiner Norwood: Your own witnesses have shown that the price is not based on costs. It is based on the market price.

Mr. Withrow: I propose to show through this witness what his position is to show his costs are so high that he is unable to sell at a lower price than the market price. I am going to show that through this witness. I think it is important to show—I think it shows the individual position of this Respondent as to why he follows the price which he follows:

Mr. Paulson: That deals with costs, and we would like an objection to the line of questions dealing with costs; until Your Honor has decided that costs are relevant, why, we continue to press our objection. We continue to contend, of course, that costs are not relevant and material in this case, and we would like our objection to this
30487 question and to the line.

Mr. Leisure: Of course, if Your Honor please, there are two approaches to that, as to whether or not you are offering costs in some tabulated form for the purpose of showing profits; which would be one approach, which is the one that we have discussed most here. But as the approach is made here it has a bearing as to how far this witness' company could sell below any market price. What in the end determines market price? Costs and competition of other materials, I suppose. So that the costs are a necessary element in this consideration.

Trial Examiner Norwood: You want to show that his costs of production are so high that he would be unable to sell below the prices made by his competitors, even in his immediate vicinity, or anywhere else. Is that what you want to show?

Mr. Withrow: I would put it in the reverse way. The price of cement is so low that this witness in his position in the territory,—with another mill close to his mill, and adjacent to a silo cannot sell below that price, and this is the reason why he follows the pricing policy which he does follow.

Trial Examiner Norwood: The issue is whether or not he follows the pricing policy and the effects of that pricing policy; not whether he could afford not to.

30488 Mr. Withrow: Well, this witness, Your Honor—this shows that the actions of this Respondent are done as the result of the economic necessity in his position and not as the result of any conspiracy or agreement with his competitors to follow this price; that this is the price which he quotes because he has to.

Trial Examiner Norwood: He may answer the question directly whether or not the prices pursuant to any agreement. You do not have to go around by way of agreement to do that. I think Counsel has taken so much time putting in matter here of doubtful relevancy that the time has come where we must try to draw the line closer. He has forced us to it, and while I shall not exclude anything that I think is going to be of the slightest value to them, I am certainly going to have to draw the line a little closer here.

The objection is sustained.

If this has to go into a cost study, we may take that issue up later, and you may put in a complete survey of costs. I shall give the Commission a chance, then, to put in their survey of costs as going to the reasonableness of price and the necessities of the particular companies; but I think we will save time not to try to go at this thing in this piecemeal way. That is, if it appears clearly

30489 that costs are relevant and material to the issues.

Go ahead.

Mr. Withrow: In view of Your Honor's ruling, I won't go any further with this line of inquiry, and note an exception to Your Honor's ruling.

Trial Examiner Norwood: Yes.

By Mr. Withrow:

Q. Is there any market for cement in Buffalo,—the location of your mill?

A. Yes, Buffalo is one of our largest markets.

Q. Would you tell us approximately how many barrels you sell in Buffalo,—during the last few years?

A. Well, in the City of Buffalo we sell one hundred fifty, probably one hundred seventy-five to two hundred thousand barrels a year, depending on the amount of construction there.

Q. Was the Federal mill the first mill in Buffalo?

A. The Federal mill was the first mill to break ground—the first mill to start in operation there. It was very close between the breaking of ground of the Federal plant and the breaking of the ground of the Great Lakes plant, as I recall.

Q. Now, at the time they started to build the mill of the Federal Company at Buffalo, what were the nearest competing mills?

A. Well, the nearest mill at that time would be probably Paynesville, Ohio, Standard; the Alpha Company at
30490 Janesville, N. Y., the Portland Point plant of the Penn-Dixie Cement Corporation, and probably the North American plant at Howe's Cave.

Q. Now, are there any additional distributing points which are nearer to your mill today than there were back in 1925?

A. Yes, about 1930—I think '30 was the date—the Huron Portland Cement Company built a pack house in Buffalo, and then in 1933 they built another pack house at Oswego, N. Y.

Q. That is in addition to the plant of the Great Lakes Company?

A. That is right. And, of course, the Great Lakes—we consider we started about the same time—we sometimes get in an argument about who is the older plant.

Q. Now, would you tell us, if you know, whether or not there is any freight advantage to any destinations as between your mill and the Great Lakes mill and the Huron silo at Buffalo?

A. Oh, I think there is some variance in the switching charges.

Q. But no substantial variance?

A. No.

Q. Would you tell us, if you know, whether or not you have higher switching charges to most points in Buffalo than these others?

A. Yes, we do.

Q. You do?

30491 A. Yes.

Q. Are there any points where you have advantageous switching charges?

A. Yes, there is one point, which is not very important. It is on the South Buffalo Railroad Company, which is our connecting line, and that serves a few of the industries there, but they do not happen to be buying carloads of cement.

Q. About what percentage of your shipments in Buffalo are made by rail?

A. Well, now, I would say about around 10 percent.

Q. How are the rest made?

A. By truck.

Q. Now, if you know, how do the charges for the cost of trucking cement compare between your plant and the Great Lakes plant and the Hu-on silo?

A. Well, they are—there used to be some difference in that cost, but now they are all blanketed. It is the same trucking charge from each one of the plants.

30492 The witness identified Resp. Ex. 2062 as a tabulation of shipments beyond the State of New York that was prepared in his office. The witness can vouch for the accuracy of the figures.

Examination on Voir Dire by Mr. Paulson.

Q. Did you, Mr. Witness, prepare this, yourself?

A. No, my chief clerk prepared that under my instructions.

Trial Examiner Norwood: Well, did you ever

30493 know what those rates were?

Mr. Paulson: Percentage of shipments,—this is shipments outside of the State of New York by this company.

Trial Examiner Norwood: Did you ever know what they were?

The Witness: Did I know what they were?

Trial Examiner Norwood: Yes.

The Witness: Yes. I saw them quite often. I do not mean—I did not see the—

Trial Examiner Norwood: Well, did you verify that statement with the books?

The Witness: Yes, that is right, and that is the figures that were submitted to the Bureau of Mines, and also to—

By Mr. Paulson:

Q. Did I understand you to say you had verified this computation?

A. I have not verified that, no, but I asked my clerk to prepare that list, and he did so, and I have absolute faith in his accuracy.

Mr. Paulson: —it does not have a high degree—the reliability does not seem to me. If we had the clerk
30494 here we could subject him to cross-examination. It might develop that he had left out some shipments and put in some others, and got his calculations wrong.

Trial Examiner Norwood: As I understand it, though, he says that those are figures which have been submitted to the Bureau of Standards.

Is that right?

The Witness: Bureau of Mines.

Trial Examiner Norwood: Bureau of Mines.

Mr. Withrow: Your Honor, I want to point out—

Trial Examiner Norwood: Is the information confidential with the Bureau of Mines?

Mr. MacIntyre: The industry has imposed a pledge that this shall not be disclosed to the Federal Trade Commission, or anyone else.

Mr. Withrow: The industry has imposed no such
30495 pledge. The Bureau of Mines said "We will not disclose any of it." As a matter of fact, there was some correspondence between the Bureau of Mines and the Department of Justice about the confidential nature of those, and the Bureau of Mines, on its own initiative, said that that information could not be disclosed, and the Government department has seen fit to stand behind this rule.

Now, as to Mr. Paulson's remark, they propose a stipulation that we prepare complete statements on the thing. Now, I have tried to meet them half way, where we could meet them, by having these figures from the books reduced to a piece of paper, to put them in as rapidly as possible, instead of developing them by lengthy and detailed examination.

Now, Counsel for the Commission obviously did not want that stipulation, or else they would not object to this manner of procedure. I mean, I do not care what they do. We are trying to cooperate with them in cutting down the record in this case; but every time we do something

they take the position that we are trying to pull a fast deal on them, or something of that type, so I think perhaps the thing to do would be to go back to the slow, orderly, tried and well-tested method of procedure, questions and answers, and not to cooperate with them.

Mr. MacIntyre: Mr. Withrow, are you offering
30496 that pursuant to the terms of the proposed stipulation which is now in evidence?

Mr. Withrow: No.

Mr. MacIntyre: You see? When they offer figures like these, and we ask them to release the Bureau of Mines from the pledge, they refuse to do it, and that comes back to the question raised.

Trial Examiner Norwood: If the complete information is available to the Federal Trade Commission, either on the books of this corporation or with the Bureau of Mines, or anywhere else, I think it would be the most expeditious thing to receive these figures.

Mr. MacIntyre: I think so, too. And we have asked them in the proposed stipulation to agree if they would make them available in just the manner Your Honor has outlined; but when I asked Mr. Withrow a minute ago if he was offering them pursuant to the terms of the proposed stipulation, he said no, meaning that he refuses to make available the information from the Bureau of Mines.

Mr. Withrow: We have no stipulation, Your Honor.

Trial Examiner Norwood: I am confining my remarks to the Bureau of Mines—

Mr. Withrow: I have not offered anything.

Trial Examiner Norwood: Just follow my remarks.

Now, I am not confining that to the Bureau of
30497 Mines, but this is available on the books of the company, and Counsel assures me that it is, the Commission has investigators, and they can find out what you want there, and I see no harm in receiving those figures.

Mr. MacIntyre: What is the Counsel's view on that?

Mr. Withrow: Your Honor, these were taken from the—

Trial Examiner Norwood: Then he cannot object to this on the ground that it is not the whole story, because it then becomes your duty to put in the remainder of the story which will serve you.

Mr. Paulson: That was not the objection, if Your Honor please. I made no such objection. The objection was that this was not the original material. It is not the books,

or any part of the books. It is a calculation made from the books by a third party, not by this witness.

I add to that objection that it is not relevant. There is nothing in issue as to how many barrels this company shipped out of its State. I do not see how it is material or relevant at all.

Trial Examiner Norwood: I think in view of the objection it will be necessary for you to get somebody who can swear to the figures. This man has said that he is not the one who can verify them from the books. Even that much you have not shown. So if the Counsel
30498 insists on his objection, I should sustain it.

Mr. Paulson: I insist on the objection.

By Mr. Withrow:

Q. Mr. Bates, would you tell us, if you know, approximately how much cement the Federal Company has shipped beyond the State of New York?

30499 A. It varies from year to year. We are trying to get an ever-increasing amount of business beyond the State of Pennsylvania.

By Mr. Withrow:

Q. And from your knowledge as sales manager, do you know whether the percentage of shipments outside of the State of New York has decreased or increased since 1933?

A. It has increased.

Q. And, if you know, can you tell us approximately what percentage you ship outside of New York at the present time?

A. Well, you mean the percentage from the beginning to the present time?

Q. No. Approximately what it is today. What is it today?

A. I would say it is seven or eight percent.

30503 Q. Into what States other than New York do you ship cement?

A. The State of Pennsylvania.

Q. And in what parts of Pennsylvania do you normally ship?

30504 A. The Northwestern part, western Pennsylvania, and north central. We get up into a couple of counties in the north central part of Pennsylvania.

Q. Now, how many salesmen do you now have?

A. We have seven at the present time.
Q. And is that the same size as you had since 1933?
A. Yes; that is right.
Q. In what territories do these salesmen solicit?
A. Individually—
30505 Q. Yes.
A. —or in the general territory?
Well, we have a man who covers the City of Buffalo. We have a man who covers outside of Buffalo up to the Monroe County line; a man working out of Rochester that covers from Rochester to Syracuse and Onondaga County. We have a man at Utica that covers from Utica on east to Schenectady; a man located in Elmyra that covers the southern part of New York State; and we have a man in Pennsylvania. That is six, I believe. And then we have a special sales representative who follows State highway work in the entire area that we market cement.
Q. Now, where is your principal market?
A. Well, our principal market is in the western part of New York State, and in that northwestern corner of Pennsylvania.
Q. In what cities are your largest sales?
30506 A. Well, in Buffalo, Niagara Falls, Rochester.

By Mr. Withrow:

Q. Now, will you tell us whether or not your company confines its solicitation of business to some definite area?
A. Well, we confine ourselves to an area that we feel we are competitive from a service standpoint and the size of the sales force that would adequately cover that particular section.
Q. Do you occasionally go beyond the territory covered by your salesmen?
A. Yes, we do.
Q. And on what occasions?
A. Well, where we have one of our old stand-by customers that might get a job beyond our normal territory, we would certainly follow him into that territory.
Q. Well, do you bid to the Federal Government beyond the regular territories where you solicit?
A. Yes, we have.
Q. Now, are there any markets in which you at one time sold cement and since have abandoned, or practically abandoned?

A. Yes, there is one practically eliminated, and
30507 that is the market around the bagging plant at Oswego.

Q. Why were you practically eliminating that plant?

A. Due to their trucking facilities that they have in several counties at that point.

Q. Now, have you ever had a fixed minimum net below which you would not take any business?

A. Well, there is nothing—I would not say we have a definitely fixed minimum. I certainly have my own ideas as to how low we would want to go. I certainly would not want to sell below cost.

Q. Well, what factors enter into the decision as to how low a net you are willing to take on a job?

A. Well, the amount of cost of selling that particular job; also what position we happen to be in at that particular time for wanting to reach out and get some additional business to operate our plant. I think that has quite a bearing on how low we would want to go at any particular time.

Q. Now, could you tell at the time of making the sale from the mill net whether you were receiving a profit or not at the time that you made the sale?

A. No, we could not.

Q. What do you now net in Buffalo?

A. Well, our mill net in Buffalo now is $1.68.

Q. Is that stripped of package and discount?

A. That is just stripped of package.

30508 Q. Well, would you just tell us if that includes the 10-cent cash discount?

A. That does include the 10-cent discount.

Q. Well, would you tell us approximately what your lowest net was during the last year or so?

A. Well, the lowest net that I recall is around about $1.34, which includes the discount.

Q. About what is your average?

A. Well, I would say our average mill net—I happen to know this figure; I looked last year, where some time ago—our figure last year was $1.52, including the discount.

Q. Now, if you know, would you tell us what the average distance is on your cement shipments?

30509 A. I would say fifty to seventy-five, probably eighty-five miles; not over that.

Trial Examiner Norwood: Well, short of eighty-five?

In other words, within the 85-mile zone would the greater amount of your cement be sold, or beyond the 85?

The Witness: Within.

Trial Examiner Norwood: Within?

The Witness: Closer to our plant.

30510 By Mr. Withrow:

Q. Well, Mr. Bates, would you tell us whether you consider that there is a so-called base at Buffalo?

A. Yes, I consider it a base at Buffalo. There is no base at our mill, however.

Q. Well, what is this base at Buffalo? What is the figure?

A. $1.60.

Q. Now, would you tell us whether or not this
30511 base at Buffalo puts the ceiling on your net above which you cannot go?

A. Yes, it does.

Q. Would you tell us how you manage to net $1.68 at the Buffalo base, which you said is $1.60?

A. Well, that $1.68 that we net is predicated on the fact that we are trucking at rates from our plant to the Buffalo market some 8 cents a barrel less than our minimum freight rates.

Q. Now, aside from the mill net that you receive at your mill, is there anything which limits the distance to which you can ship?

A. Oh, yes. The service is very important to a customer.

Q. Well, if it were not for this service, would you tell us whether or not you would be free to sell and solicit cement as far as you want to go?

A. You say are we free?

Q. Yes.

A. Yes, indeed.

Q. Now, in connection with the Burns and Clark survey of the cement business, were you the one who prepared the answers to that questionnaire?

A. No. I recall that vaguely. I think I helped but most of the answers were prepared by our assistant treasurer.

Q. Now, Commission's Exhibit 973-3-K says that Federal made shipments netting from 70 cents below the
30512 so-called base at Buffalo to 15 cents above. Do you have that widespread at the present time?

A. No, sir.

Q. Well, this Burns and Clark questionnaire indicates that the 70-cent figure was on a sale to Sparrows Point, Md. Has the Federal Company ever solicited and sold cement in Sparrows Point, Md.?

A. No, we never have. I think probably that is a reference to the Bessemer Cement Corporation.

Q. Well, I assume, without going into all the details, that any facts or figures reported in the Burns and Clark questionnaire for the sales before, say, January, 1933, would apply to the Bessemer Cement Corporation and not to the Federal Cement Company?

A. That is correct.

Q. Do you sell at any place now which nets you 15 cents above the so-called base at Buffalo?

A. No, sir.

Q. Or to any place that nets you 70 cents below that?

A. Oh, no.

Q. Has there ever been such a wide spread of 85 cents since Federal has been marketing cement?

A. No, sir.

Q. Now, Federal Trade Commission Exhibit 1063-A indicates that you were mailed an invitation to bid on
30513. a W. P. A. project at Rolling Fork, Miss. Have you ever sold down the State of Mississippi?

A. I should say not. It is too far away from us.

Q. Then, did you bid on that invitation?

A. We did not.

30515. Q. Now, Federal Trade Commission's Exhibits 1391 and 1394 show that you got an invitation to bid on May 5, 1938, for cement to be used anywhere in Ohio or West Virginia.

I show you Exhibit 1394 and ask you if you remember receiving that invitation.

A. Yes, I do recall this. We did not bid on it.

Q. Well, why didn't you bid?

A. Well, because we do not solicit business in Ohio or West Virginia.

Q. And would you just tell us briefly why you do not solicit business in Ohio or West Virginia?

A. Well, because we know there are companies out there who would bid much cheaper than we could.

Q. Now, Federal Trade Commission's Exhibit 1395 shows that you got an invitation to bid for the use of ce-

ment anywhere in New Jersey. Do you recall that invitation?

A. Yes, I do.

Q. Is Commission's Exhibit 1399 a copy of that invitation (handing document to the witness)?

30516 A. Yes, this is the one that I answered your question on.

Q. Did you bid on that invitation?

A. No, sir; we did not.

Q. Well, why not?

A. We do not solicit business or sell any business in the State of New Jersey.

Q. And why don't you solicit or sell in New Jersey?

A. Because our freight rates in Buffalo to New Jersey would make it absolutely impossible for us to accept that low mill net to meet the competitive price at that point.

Q. Now, referring to all three of these invitations, did you not bid on these three invitations—would you tell us whether or not you did not bid as the result of any agreement or understanding with your competitors?

A. No, sir; whatsoever.

Q. Now, with what cement companies do you come in competition in the territory where you market cement?

A. Well, too many, I can tell you that.

Of course, our main competitors are companies right in Buffalo. The Lehigh Portland Cement Company and the Huron Portland Cement Company are near somewhere, and we are battling every day to secure business.

We also come in contact with West Penn and Pennsylvania and the Green Bag Company to some extent; Standard, quite a little; Bessemer Limestone & Cement

30517 Company; Glens Falls. Practically all of the Lehigh Valley mills come into our section of the country, and probably some of them I have met in this competition. I know there is sufficient competition to suit me.

Q. Well, about how many cement companies do you find soliciting business in any of your important markets?

A. Well, I would say fifteen, anyway, fifteen or twenty companies that would be soliciting in the market like Rochester, New York. Of course, we do not have that many in Buffalo, due to the fact, as I stated before, that a lot of those companies can't possibly serve the Buffalo area like we can.

Q. Would you tell us whether or not you instruct your salesmen to sell all the cement they possibly can?

A. Yes, indeed, both by written instructions and by field instructions. I make it a point to be in the field with my salesmen quite often during the year.

Q. Would you tell us whether or not there has ever been an occasion since you have been with the Federal Company that you did not solicit business as actively as you could?

A. No, indeed.

Q. Now, is it your custom, Mr. Bates, to send memoranda to your salesmen from time to time about your sales policy, and such matters?

A. Oh, yes.

Q. And what are those memoranda generally about?

30518 A. Well, I am urging the men to greater sales efforts, of course, and about any other current subject that might come up at the particular time.

30522 Q. Does any sales quota which your company has have any reference to any plan for allocating business among competing cement manufacturers?

A. It has not.

30523 By Mr. Withrow:

Q. Do you, Mr. Bates, usually sell your cement at delivered prices?

A. We always do.

Q. Have you ever sold on any other basis?

A. No.

Q. Do you make any f.o.b. mill sales today?

A. We make a few.

Q. Under what circumstances?

A. Well, we have some of our dealers in close proximity to the plant, come into the plant with their trucks, pick up cement.

30524 Q. Under what circumstances,—under those circumstances what price does the buyer pay?

A. He pays the destination price,—his destination price.

Q. Have you ever sold to trucks at a platform price?

A. Not the Federal Portland Cement Company.

Q. Now, why did the Federal Company adopt a policy of usually selling at delivered prices when it started to make cement?

A. Why, that is because that is where we find competition is, at the destination.

Q. Would you tell us whether or not you would be free to sell on an f.o.b. mill basis if you decided that is desirable?

A. We certainly would.

Q. Do you have any requests for f.o.b. mill quotations?

A. Well, about the only requests we have for f.o.b. mill prices is from the United States Government.

Q. Have there been many such requests?

A. Well, I—we received a few of them, I just do not know how many, but I know we do receive them.

Q. Do you sell any cement to railroads?

A. Oh, yes.

Q. How do you sell them?

A. We sell them both ways. We sell them at delivered prices but we will quote them destination price or we will quote them f.o.b. their rails.

30525 Q. Mr. Bates, when you sell the railroads f.o.b. their rails do you handle that sale as an f.o.b. mill sale, or delivered price sale?

A. A delivered price sale.

Q. Do contractors ever write to you requesting a price for cement?

A. Yes.

Q. Well, what do they request, f.o.b. mill prices or delivered prices?

A. Delivered prices at destination where they are going to use the cement.

30526 The witness identified Resp. Ex. 2074 through 2077 as requests for quotations received in the regular course of business of the Federal Company.

30531 Mr. Leisure: Of course, this is not the time to argue on what Mr. MacIntyre raises at all. But the question is whether or not we should be allowed to show that these specific customers wanted this cement at delivered prices.

Mr. MacIntyre: That would be irrelevant and immaterial.

Trial Examiner Norwood: In the interest of a full investigation, we have permitted considerable testimony along that line, and I think if the Counsel wants to save time, he can dispose of that whole business by one question to this witness. Let him tell us what the custom was when it began, and what he did about it.

I think I will reject those exhibits.

I sustain the objection to them.

Mr. Withrow: Your Honor, we offer to show from these documents, and testimony based on these documents, that this witness' company, the Federal Portland Cement Company, Inc., has received, and does receive, requests from contractors and dealers only for destination prices and that these requests are received in the regular course of business by that company, and that these ex-
30532 hibits, Respondents' Exhibits 2074 through 2077, are typical of the requests for delivered prices received by this Respondent.

Trial Examiner Norwood: Proceed.

By Mr. Withrow:

Q. Now, when you receive a request from a dealer or contractor for a price on cement, what do you do? What is the routine?

A. We ascertain the delivered price of cement at that point and quote him on that basis.

Trial Examiner Norwood: The selling on delivered prices is based on these requests by the trade?

The Witness: That is right. Our customers want to know what their cement is going to cost them at the point of use.

Trial Examiner Norwood: How long has that been the custom?

The Witness: Ever since I have been in the cement business.

Trial Examiner Norwood: How long is that?

The Witness: Well, that is 16 years.

30533 The witness identified Resp. Ex. 2078 as typical of the way Federal quotes a contractor where they receive a request for prices. This was in reply to a request received through their representative for prices for a certain contractor on a specific job. They are prepared in the regular course of business. Probably 50 or 75 of those were sent out a day. Resp. Ex. 2079 as a copy of their formal quotation to one of their dealers.

Mr. Paulson: I do not believe I will object to these, Your Honor, although they are simply quotations. I do not see how they can have any bearing on the issues in this case whatsoever.

Trial Examiner Norwood: Received as marked.

(RESP. EXS. 2078 and 2079 were offered and received in evidence.)

30534 By Mr. Withrow:

Q. Mr. Bates, will you tell us what State highway departments do you bid to, sell to?

A. Well, we sell to the New York State Highway Department.

A. And have you ever sold the Pennsylvania State Highway Department or quoted them?

A. Some years ago we did out of Buffalo, but in recent years they have had kind of a buy-at-home rule in Pennsylvania which excludes out-of-State plants.

Q. Well, now, from your knowledge in handling these bids, would you tell us whether or not the State Highway Departments of New York and Pennsylvania, whether they ask for f.o.b. mill bids or f.o.b. destination?

30535 A. In every case I have seen it is f.o.b. destination.

Q. You testified, Mr. Bates, that on a few occasions you had an inquiry for f.o.b. mill bids from the Federal Government. Mr. Bates, why don't you bid f.o.b. mill on requests from the Federal Government?

A. Well, that is contrary to our sales policy in the first place, and if we did bid an f.o.b. mill price to the Government, we would have to give that f.o.b. mill price to every one of our customers.

Q. Well, why don't you sell on an f.o.b. plant basis to all your customers?

A. Well, because we have got to retain the good will of certain of our dealers for whom we restrict the sale of our product to certain areas, certain towns. If we open our plants so that anybody can buy at f.o.b. mill, the dealer has lost all of his protection, as far as we are concerned.

Q. And have any of your dealers requested you for f.o.b. mill prices?

30536 A. No, sir.

Q. Well, why couldn't you make an exception in the case of the United States Government without being compelled to sell every one that came to your plant?

A. Well, I don't know how in the world that you would talk to a customer that you refused to give the same basis of sale as you would the United States Government. I do not see how you could make an exception.

Q. Do you remember the invitation to bid on 3,000,000 barrels, which bids were opened on April 15, 1938?

A. Yes, sir.

Q. And I show you Commission's Exhibit 1339 and ask you if that is the invitation?

A. Yes, that is right. This is a copy of our invitation.

Q. Did you bid?

A. No, sir.

Q. Why didn't you bid?

A. Well, our primary purpose for not bidding on this, was because bidding an f.o.b. mill price was contrary to our policy and the f.o.b. mill sale was a controversial point in our particular case at the time, and I so notified the Government.

Q. Did you write to the Federal Government explaining your position?

A. Yes, sir; I did.

30537 Q. And I show you Respondents' Exhibit 2080. Is that the letter you wrote to the Government?

A. Yes, that is a copy of a letter that I wrote to the Government attached to our proposal.

(RESP. EX. 2080 was offered and received in evidence.)

30538 By Mr. Withrow:

Q. I show you Respondents' Exhibit 2081, and ask you if that was prepared in your office?

A. Yes, sir; not only in my office, this was prepared by myself.

Q. And when was it prepared?

A. At the time that this proposal came out I was zoning off certain sections in the State of New York.

30539 Q. And what did those zones represent,—zone 1-B and 2-A?

A. Well, this is the eastern part of New York State, and this zone 2-A and 2-B is west of Utica, N. Y.

Q. Are those the zones referred to in the Commission's—

A. In the Commission's bid, or in this Government proposal.

Q. And where did you get the information you have down here, zone 1-B, zone 1-A, zone 2-A, and 2-B, Huron?

A. I got that information from one of the officers of our company.

Q. And just interpret this, under the conditions of the bid, of that invitation, you would only have been able to bid in zone 2-B; is that correct, as you understood the invitation?

A. That is right.

30542 Q. Mr. Bates, did you prepare that map for use in this case?

A. I did not.

Q. Will you tell us why you did prepare it?

A. Well, I wanted to see primarily where those zones were in the State of New York. We are competitive

30543 in that section there, and I wanted to see what zones we would get prices in if they did.

Q. And would you tell us whether or not, drawing that map and indicating the Huron bid in two of the zones,—is that part of your activity in following the results of the so-called Good Friday bids?

A. Yes. I wanted to see what our competitors were doing.

Q. Why were you interested in the results of the Good Friday bid?

A. Because I wanted to see whether or not in the future that our competition would force us into quoting on just that type of business.

Q. And was this prepared in the regular course of your business?

A. This map?

Q. Yes.

A. I prepared a map similar to that in any one of our—

Q. And does it accurately portray this condition on which you base your conclusions about the Good Friday bids?

30544 A. Why, yes. It had something to do with that.

As a matter of fact, I was interested in what was going on, what was going to happen to that particular bid, and I wanted to see whether or not the entire State of New York would be bid f.o.b. mill, so I drew the map to find out just where those prices would come in to see where we had to meet certain types of competition.

Trial Examiner Norwood: Well, does that map accurately depict the competitive situation about the time those bids were made?

The Witness: Yes. It shows where the bids were made.

30545 (RESP. EX. 2081 was offered and received in evidence.)

Q. Did any of the companies in your territory bid on this so-called Good Friday bid?

A. Yes. There was one company in our section bid it.
Q. What company bid?
A. The Huron Portland Cement Company.
Q. And at what points did they bid?
A. They bid an f.o.b. mill price at Buffalo and one at their packing plant in Oswego.
Q. And those were in zones 2-A and 2-B?
30546 A. That is right.
Q. Do you recall what figures they bid?
Mr. Paulson: Your Honor please, I object to that.
A. No, I do not.
Mr. Paulson: The bids, themselves, show what was bid. This man is not the Huron Company.
Trial Examiner Norwood: The objection is sustained.

By Mr. Withrow:

Q. Did the Huron Company receive an award for bidding on this job?
Mr. MacIntyre: I object.
Q. If you know.
Trial Examiner Norwood: I think it is a factual matter that he may give us if he knows it.
A. No, I do not believe they did.

By Mr. Withrow:

Q. Well, would you tell us whether or not the Federal Government has issued any subsequent invitations to bid without indicating the destination where the cement was to be used in territory where you normally sell and solicit sales of cement?
A. I do not believe I get that, Mr. Withrow.
Mr. Withrow: Would you read the question, please, and we will see if the witness understands it before I ask another question.
Trial Examiner Norwood: Read the question.

30547 By Mr. Withrow:

Q. How do you determine, Mr. Bates, the price at which you will sell cement at any particular destination?
Trial Examiner Norwood: You determine those prices for your company, do you not?
The Witness: Yes, sir; we find out what the price is at destination and we meet that price.

By Mr. Withrow:

Q. Well, how do you get the information about prices?

A. Well, our salesmen are continually checking prices in the field, and they will pick up quotations from their dealers.

30550 Q. How do you get information about prices in the field, Mr. Bates?

A. That is information that our salesmen pick up in calling on dealers and contractor-customers. We also have some of our very good friends that will call us up immediately upon receipt of a change in price. I have that happen in my office quite often.

Trial Examiner Norwood: Those are dealer friends, you mean?

The Witness: Yes, sir; dealer friends. And contractor friends have called me, also.

By Mr. Withrow:

Q. Well, are your salesmen instructed to pick up
30551 price quotations if they vary from your announced price?

A. These are general instructions, to be on the look-out at all times and keep their ear to the ground for any change, not only of price but of any other matters that affect us—affect the marketing of cement.

Q. At how many points do they pick up these changes in price?

A. Well, there is no set number of points. A salesman might pick up ten or fifteen points in a day, or might only pick up two or three. But we want all our salesmen to pick up this data. We want to accumulate all this information to enable us to know if there is a definite move on prices.

Trial Examiner Norwood: When you get that information, do you know how to figure the prices within your territory at other points?

The Witness: We have to check those prices back, Your Honor—

Trial Examiner Norwood: Yes.

The Witness: —and find out the pattern on which the price has been made and then, of course, we meet that competition.

30552 By Mr. Withrow:

Q. I believe in answer to one of the Judge's questions, Mr. Bates, you said that you tried to find what the pattern was of the prices that you picked up in the field.

Will you tell us whether or not you are able to tell how a competitor arrives at this new price which he quotes?

A. Well, I do not know how he arrives at his price, but I am able to check back and find the definite pattern the price is made from.

Q. And what do you call the point from which these prices appear to have been figured?

A. Well, I have always known them as basing points.

Q. Does the base or basing point mean anything more to you than a figuring point?

A. No, sir. That is all it is.

Q How many destinations do you search for before you are satisfied that you have enough information to check the price change?

A. Well, Mr. Withrow, there is no set number.
30553 We will check as many points as we can get prices on. The more we get the better we are satisfied. We have got positive proof that there has been a movement in the price.

Q. Has there ever been a time, Mr. Bates, since you have been with the Federal Company, that your salesmen were not supposed to send in quotations showing changes in price?

A. That they were not supposed to send them it? Certainly not. We want those quotations. That is part of their every-day duty.

Q. Now, would you tell us whether or not you take the word of the salesman about the instance of new prices at destination, or do you insist upon a specific quotation?

A. Well, we want to get that specific quotation.

Q. Well, have you ever found that reported prices on which your salesmen did not send in quotations,—that those quotation prices were inaccurate?

A. Yes. Occasionally you will find that a dealer might
30554 be able to convince your salesman that he has a special price of some kind, but he can't produce it, but he is such a good salesman that he sells our man on the idea, and our man gets excited and immediately calls me and tells me that so and so has a better price than we have.

Q. Would you tell us whether or not that is the reason that you insist on your specific quotations?

A. Yes, sir. I want all the facts and evidence that there has been a movement.

Trial Examiner Norwood: Well, in those cases where he gets excited and telephones in that a dealer has a better price than yours, then what do you do about it?

The Witness: Well, I ask him to get me a copy of the quotation and to check some other points around that particular destination that he found a special price to get me all the evidence he can.

30556 Q. Would you tell us whether or not you have ever had instances where dealers mail in quotations direct to your office?

A. Oh, yes; quite numerous.

Mr. Withrow: I wanted to round out the picture.

Your Honor, I would like to save some time on this, if I can.

I have here a price file of this company, consisting of 51 documents, I believe, being the papers, quotations picked up by salesmen; and also some of them indicating that they were mailed in direct by dealers to this company; showing the manner in which this material was obtained, and showing what is done with this material when it gets to the office; in addition, a few inter-office communications concerning this price change.

If I could ask a few questions about this, perhaps it would not be necessary to offer all of these; or probably
30557 to have the record complete, they should be marked, so that when they are referred to there would be some means of knowing what is referred to.

Now, I want to do this in the manner in which it will be most helpful.

Trial Examiner Norwood: Are there any essential differences between these methods illustrated there and the ones already shown? That is, are there any essential differences between those documents and the ones we have heretofore admitted merely for illustrative purposes?

Mr. MacIntyre: If Your Honor please,—I dare say—

Trial Examiner Norwood: Wait a minute. Let him answer. I asked him.

Mr. Withrow: Well, this price file of this company is made up in much the same way as some of the others. There are some differences. For example, this company uses a form of dealer report, which reports on a lot of things, including—

Trial Examiner Norwood: You mean it is a salesman's report of a visit to a dealer; is that it?

Mr. Withrow: Yes, and that also deals with price change. It shows that that is part of the routine work of the company.

Now, I do not know—I am not familiar with all of the exhibits, but I do not know of any company which
30558 uses quite that procedure.

I am open to any suggestion as to how to do it, but I do not know how I can refer to them in examining this witness about them unless the documents are marked.

Trial Examiner Norwood: Well, unless they are different from what you describe there, I do not see any use in even marking them.

Mr. Withrow: Well, if we can have the record show, Your Honor, that there is such a price file, and that this company did collect this information, has collected it, and keeps it as a price file on price changes—

Trial Examiner Norwood: Yes.

Mr. Withrow: —we can save time, and perhaps we won't have to have them marked.

Trial Examiner Norwood: Would Counsel for the Commission stipulate to that?

By Mr. Withrow:

Q. Was that a correct statement, Mr. Bates?

A. Yes; that is right.

Q. Are these a price file?

A. Those are competitive quotations and information received from our salesmen in changes on prices, or in the marketing conditions, and other things.

30559 Q. Will you tell us, Mr. Bates, if you prepare such a price file on all of your price changes that you find current in your market?

A. Yes, we do, when we have evidence that there has been a movement in price; what we do is to issue quotations similar to those in form to all of our customers that we are selling, or that we solicit business from.

Q. And would you tell us whether or not you have used the same method ever since Federal started to market cement in August, 1933?

A. Yes, sir.

Q. Now, Mr. Bates, do you recall an increase in price in northwestern Pennsylvania in early 1936?

A. Yes, I do. That I believe—I know that was instituted by the Standard Portland Cement Company

30560 because that was the price that we found, the quotations that we found that moved the price up in that section.

Q. Now, in what territory did this affect the Federal Portland Cement Company?

A. In northwestern Pennsylvania and in Niagara County. There are some points there, and we also found some points up in the northern part of New York State; what we call the northern. It is up around Pulaski, N. Y., and Watertown, in through there.

Q. Now, what was your first information concerning this increase?

A. As I recall, Mr. Withrow, that was a call from our man in the field, or men in the field, and followed by sending the quotations into our office.

Q. And did your salesmen mail any quotations in this instance?

A. Yes, they did, and in several different territories our men picked them up.

30561 The witness identified Resp. Ex. 2084-A as quotations which their salesman, Signer, sent in about that change in 1936. The handwriting on the front of them is that of the witness' chief clerk. The witness initialed them as they went over his desk.

30562 (RESP. EX. 2084-A to 2084-N was offered and received in evidence.)

By Mr. Withrow:

Q. Did you go along on this price increase, Mr. Bates?

A. Yes, indeed.

Q. And what did you do?

A. We issued quotations and met the destination price of those companies.

Q. To whom did you send quotations?

A. Sent this to all of our dealers that we had been selling, and to prospective dealers that we hoped some day to be able to sell.

Q. Mr. Bates, do you recall the termination of the emergency freight rates charges on December 31, 1936?

A. Yes, sir; I do.

Q. Will you tell us whether or not this had any effect, or whether at about that time there was a reduction in price?

A. There was, to the amount of the emergency freight rate charge.

Q. Now, do you recall, Mr. Bates, when you issued your quotations concerning that reduction in price?

A. Yes. We issued our quotations, I believe, on December 26th and effective January 1st.

30563 Q. Did you check to see whether other companies followed this decline in price which you announced?

A. Yes, we did.

Q. What did you find?

A. We found that they did.

Q. Did they issue their quotations before or after you, if you recall?

A. Well, I do not recall that. I know that we watched —we checked the trade and we found that their prices were reduced by the amount of that emergency freight rate.

Q. Now, do you recall, Mr. Bates, an increase in the emergency freight rates effective on November 15, 1937?

A. Yes, there was one at that time.

Q. Will you tell us whether or not you automatically increased your price when you found out about this increase in freight rate?

A. Yes, we did.

Q. And did you check in the field to find out whether or not any of your competitors also increased their price?

A. That is right, they did, just the same as we had followed the other procedure,—took it off.

Q. Would you tell us which you did first, found other quotations in the field, or decided in your own mind to increase the price because of the increase in freight rate?

A. Well, I think we issued our quotations be-
30564 cause the freight rate was going to be increased and our quotations went out on that basis.

The witness identified Resp. Ex. 2085-A, B, as a quotation with the company's stamp thereon picked up from one of their dealers in connection with that increase.

Q. Now, does this refresh your recollection as to when the price increase became effective?

A. Well, on this particular point, Spencerport, it could not become effective until November 22.

Q. Why couldn't it?

A. Because here is a company that says effective the 22d, they are raising the price, and ours had been effective the 15th or 16th.

30565 (RESP. EX. 2085-A and 2085-B was offered and received in evidence.)

By Mr. Withrow:

Q. Now, Mr. Bates, would you tell us if you know whether or not in the regular solicitation of the trade your salesmen are asked on many occasions by the dealers what the price is?

A. No, the dealer knows pretty generally what his price is. He has enough information there concerning the price. Occasionally we will have a dealer ask what the price is, especially one of those dealers who does not buy very often.

Q. Would you tell us whether or not, if you know, your salesmen carry some sort of a record book with the prices in the territory where they solicit?

A. Yes. We have salesmen that have their own system; they will take their road book, for instance, and they might go through there, and on their regular towns that they are calling on, they might insert the price there themselves. I have seen it in many of our salesmen's books.

Q. Now, did you find that your salesmen secure many warehouse orders while calling on dealers?

A. Not any more. It used to be that the salesmen did, but now it is generally the dealer calling us.

Q. Now, when a salesman does get an order, what does he do?

A. Well, ~~if it~~ is for immediate shipment the 30566 salesman might turn to the phone and give us a call, or he might make out what we call a salesman's order, carrying the information and the date of shipment, and so on and so forth, which he sends to the office.

Q. Well, now, when he fills out an order blank, is that order subject to confirmation by the home office?

A. That is right.

Q. Does that include the price which he quotes, which is also subject to confirmation?

A. You bet it is.

Q. Do you ever enter into specific job contracts or specific sales orders with customers of yours?

A. Oh, yes, quite often.

Q. And why do you do this?

A. Well, to offer that customer protection on the amount of cement necessary to complete a certain project upon which he has bid. It might be a matter of protection to a block manufacturer over a certain period in his

manufacture of blocks. We might be protecting a dealer who was re-selling our cement to some contractor.

Q. Now, do you issue quotations to the trade announcing what your price is at regular intervals?

A. No, not at regular intervals. We will always send quotations out when there is a disturbance in the field after we determine what it is; we will quote all our
30567 customers, but occasionally, or when we so desire, we will send quotations out to our customers with an easy order form on the bottom of it, so that the dealer could fill it out and send it back to us. We found that the dealers, of course, are not very good at writing letters. We make it just as easy as we can for them to sit down and sign their name to a piece of paper and order a carload of cement. I would say in a year's time we probably would send out maybe four such pieces of correspondence to the dealers.

Q. And do I correctly understand your testimony, in the event of a price rise or price decline, you always send them out?

A. Absolutely; yes, sir; because we have got to be competitive.

Q. Now, what do you show in your price quotations?

A. Well, I show the customer to whom it is issued; we also show the effective date of our price; we show the destination price.

Q. Do you ever show what the freight rate is on one of those quotations?

A. No, sir.

30568 Q. You do not send lists of delivered prices to dealers?

A. Oh, no, no. We send each individual dealer a price.

Trial Examiner Norwood: Do you give the salesmen a list of the whole thing?

The Witness: No. As a general thing we do not. We have issued price lists, but not as a general practice.

Trial Examiner Norwood: Do you give a list covering all the points in his territory?

The Witness: Not all of them. We cover some of the points in his territory where we are soliciting business.

By Mr. Withrow:

30569 Q. Well, would you tell us whether or not in any of these quotations that you have ever issued,

you indicated any basing point on which the price,—quoted price,—was figured?

A. Do you mean on the quotation?

Q. Yes.

A. No, there is nothing on that quotation, except, as I told you, that is the destination price and the dealer's name and the date it was issued.

Q. And do you keep a copy of the change in the quotations which you mail to your dealers?

A. No, we do not.

Q. Do you keep a record in any way of the figures you quote the dealer?

A. Yes, sir; we do. We keep a record in our office.

30570 The witness identified Resp. Ex. 2080 as their Cardex record on which they have tabulated the various price movements in this particular time for the customers named. They have a card like this for every dealer in every town where they solicit and sell cement. He further identified Resp. Ex. 2087-A and B as the sales order form he referred to a few minutes ago. It has been in use ever since they started marketing Federal Portland Cement, that is since August 1933. He further identified Resp. Ex. 2088-A and B as a copy of a specific sales contract used during the NRA and very similar to the form being used to this day; Resp. Ex.

30571 2089-A and B as a specific sales order used to make a sale to a dealer. It was used during the time of the Code and is still in use and substantially the same. He further identified Resp. Ex. 2090-A and B as the present form used in sending out quotations. "It does not have the other attachments such as I explained a few minutes ago."

Mr. Withrow: Your Honor, at this time I also offer Respondents' Exhibits 2088-A and B, 2089-A and B, and 2090-A and B, but I do not want to offer—I am offering these forms showing terms and conditions. There is specific matter filled in, and I am not interested in that. I am not offering that on any of those three documents.

Examination On Voir Dire By Mr. Paulson.

Q. Mr. Bates, is this in use at the present time, 30572 Respondents' Exhibit 2087-A?

A. Yes. We use a form similar to this. Of course, we do not have the N.R.A. on it now, I don't believe. We use this form so seldom—as I said, our salesmen very seldom pick up an order at a dealer's place that is not to be shipped immediately. That is used like a 15-day shipment.

Q. Not much of your cement is sold on that?

A. Not with the use of that form any more, no.

Q. And is this quotation form a form that you are now using?

A. That is right.

Q. And the specific sales contract, Respondents' Exhibit 2088-A, is that the form which is now in use by your company?

A. I would say—I would not know without comparing the two, but I would say they are substantially the same. The N.R.A. is not on the form we are using now, but outside of that it is pretty much the same as the form we are using today.

Q. Now, when you did use this form did you sell much of your cement on this type of a form?

A. Oh, yes, quite a bit.

Q. Twenty-five or thirty percent, approximately? I mean, an appreciable amount?

A. I do not know. I would say any time we closed a specific contract, when we made a direct sale with a general contractor we used that particular form. We also used the form at the time of a price change.

30573 Q. Can you recall offhand any of the material changes that have been made in it, or any of the changes that have been made in this form?

A. I can't right now, no, not without comparing the present form we use with the form there.

Q. I notice on the back of the exhibit, 2088-B, the paragraph headed "seller" is blocked off with a red line there, and that paragraph provides:

"The seller reserves the right to select the route and method by which shipments shall be forwarded, but no seller can be required to favor any one route."

Is that still on your contract?

A. Yes, sir; it certainly is.

Q. Well, in the next one, Your Honor, the specific sales order,—that is, 2089-A,—I want to ask him about whether or not this is the form which is now being used.

A. We use both those forms.

30574 Mr. Withrow: He testified that he used those during the N.R.A. period. He used them, and they are admissible.

Trial Examiner Norwood: All of them? Is that right?

The Witness: You are asking me?

Trial Examiner Norwood: Yes.

The Witness: Yes; we used those forms during the N.R.A. period.

Trial Examiner Norwood: And you are not using them now?

The Witness: Well, we use the same type of form. They are similar to that form. As I say, we have

30575 now contracts printed up, and we eliminated the Blue Eagle, so to speak. I would say that they are very similar to that form that we are using today. There are two distinct types of contracts there.

Trial Examiner Norwood: And you cannot tell us definitely just when you began to use them and when you discontinued to use them?

The Witness: Well, I would say we discontinued using that particular form of contract right after the N.R.A. went out the window.

Mr. Withrow: He started doing business, Your Honor, he testified, when the N.R.A. had already been passed.

The Witness: That is right.

Mr. Withrow: I want to show what this company's terms and conditions of sale are, and how they got them has a bearing on that. It is the shortest way of putting it in.

30577 Trial Examiner Norwood: I think that those may be received to show the forms that were used during the N. R. A. period, and I think if I admit them, I will admit them for no other purposes.

30579 (RESP. EXS. 2086, 2087-A, 2087-B, 2088-A, 2088-B, 2089-A, 2089-B, and 2090-A, 2090-B, were offered and received in evidence.)

By Mr. Withrow:

Q. Now, Mr. Bates, will you tell us whether or not you have any agreement with respect to price with any of your competitors?

A. No, sir.

Q. Would you tell us whether or not when you quote a price at some point where you sell cement, whether you have any assurance that your price would be as low as the prices being quoted by your competitors?

A. No, sir; at the time we make the quotation we do not.

Trial Examiner Norwood: Do you have any belief in regard to that?

The Witness: I beg your pardon?

Trial Examiner Norwood: Do you have any belief in regard to that?

The Witness: Well, we hope it is, and the best evidence as to that is the fact that we receive business on the price used, and we assume it is the lowest price the customer might have.

By Mr. Withrow:

Q. You testified earlier that you attempted to
30580 find some pattern of these prices. What is the pattern that you find in most of these destination prices in your territory?

A. Well, they may be usually what we call a base price plus the freight plus the package to that particular destination.

Q. And do you find that all of the prices that you quote and meet are apparently a combination of some base plus freight plus the package?

A. Why, we must have some arbitrary prices established that would go back to a constant figure.

Q. Well, are these so-called arbitrary prices higher or lower than the combination so-called base and freight and package?

A. Well, they are usually lower.

The witness identified Resp. Ex. 2091 as a form that his assistant uses in calculating the price. This (indicating) is the delivery point here, where he [not the witness] is figuring what he assumes to be the delivered price to that particular point.

30582 *Examination on Voir Dire by Mr. Paulson.*

Q. Mr. Bates, can you tell me what the pencil figures headed "Rate" mean?

A. You mean up here (indicating)?

Q. Yes.

A. Yes. This is the rate from these various points to Angelica, and this (indicating) is the lowest combination of the base plus the rate to destination, and we encircled that showing that this is the lowest rate that we can figure at that point.

Q. This is in typewriting down here (indicating), "figured by W. J. J."—

A. That is H. J. S. That is H. J. Shultz, my assistant; and it is checked by a clerk in the office, Mr. Frank Schwab.

Q. Do you know where he got the rate of 18 cents?

A. This rate here was undoubtedly taken from our rate book.

Q. What rate book are you talking about?

A. The Cement Institute's rate book.

30583 (RESP. EX. 2091 was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Bates, would you tell us whether or not it is the practice in connection with making your bid, sealed bid, to use a form like 2091 in assembling your material before you would decide what figure you would bid?

A. Not necessarily. If it is a town that we have been shipping cement to, we would take that figure from a card index and we would insert that figure in our bid.

Q. Now, there are a number of points across that Exhibit 2091. Why have you just listed those points?

A. Could I see that, please?

(The exhibit was handed to the witness.)

A. Well, those are the figuring points or the bases that we come in contact with in the territories that we market our cement.

Q. And those figures listed down there, $1.75 to Buffalo, and so forth, would you tell us whether or not you secured the information as to that figure in the manner you described earlier about picking up quotations?

30584 A. Yes, sir: by working it back and finding the pattern on which the prices were based.

Q. Would you tell us why you used a form like this?

A. Well, it is convenient, that is about all. It has all the headline points that we have ascertained in our territory, and my assistant puts the freight rate in there and determines immediately just by glancing which is the lowest combination of those prices base plus freight plus package.

Q. Now, would you tell us whether or not you have ever received lists of bases or so-called base prices from your competitors?

A. Well, now, no, we never have. I might tell you why, Mr. Withrow, I hesitated there. I am looking at the Bessemer Limestone & Cement Company now as my competitor, but at one time I did receive a list of base prices from Mr. Charles Schmutz, who was the vice-president of the Bessemer Cement Corporation.

Q. You were working for the Bessemer Cement?

A. And I was working for them at that time, and they were no competitor,—I mean, at that time,—but they are today. That is the only reason that I hesitated
30585 giving my answer there.

Q. Have you ever sent, since you have been with the Federal Company, a copy of your information about price bases to any of your competitors?

A. I have not.

Q. Have you ever sent any such information to any of your dealers or other customers?

A. No, sir.

Q. I believe earlier, in answer to the Examiner, there was some mention about price lists. Do you ever send, or have you ever sent lists of delivered prices to your salesmen?

A. Yes, we have at times sent a list of prices.

30588 Q. Mr. Bates, would you tell us whether or not you have ever engaged in correspondence with your competitors about either their prices or your own prices?

A. No, sir; I never have.

Q. Now, do your salesmen have any discretion in meeting prices in the field?

A. No, they do not. That is my responsibility.

Q. I believe you testified that you generally quote the lowest price you find in any market. Well, will you tell me why you do not quote a lower price than you
30589 find your competitors quoting in a given market?

A. Well, if we quote a lower price, it would just take the reverse English of what you find. If we found a lower price than ours we meet it. If we quote a lower price than ours, they would meet our price. There we would be, at the same spot we were when we started.

Q. Has that been your experience?

A. Absolutely, every time.

Trial Examiner Norwood: Every competitor would meet your price in case of a lowering in your immediate vicinity, where it would make a profit to you,—that would reduce his mill net below what he cared to sell for?

The Witness: Well, Your Honor, in answering that question I do not believe that I could make the price low enough that it would keep a competitor from coming in after a piece of business if he wanted it. At least, I have never found an instance of where that has happened.

Trial Examiner Norwood: Well, you have a competitor right close to you, don't you?

The Witness: That is true. Of course, we do not—

By Mr. Withrow:

Q. Go ahead.

A. I am sorry. We do not all have the same idea about how low we should go. I realize that; I know that 30590 I have in my mind very definitely some idea about what I want to get for my cement.

Q. Well, has there been any instance recently within the last couple of years where a company reduced the price in one of your principal markets?

A. Yes, yes. We have had a price reduction in our Buffalo market. We have had one up in Oswego.

Q. Well, was it your experience from either one of these reductions that any companies were driven out of those markets?

A. Well, I can just answer for my own company, that we were practically eliminated from the Oswego market.

Q. Was that because of the price or because of some service?

A. That was on account of the—well, it would go back to price, probably. It was a service that the Huron Cement Company gave to their customers, a service that we could not possibly meet and secure a sufficient amount of money by meeting that service to warrant our taking that business, so we just simply moved out of that market.

except occasionally we do get, you might call it, a complimentary order from some dealer that would buy a carload, or some contractor would buy a carload of cement. We cannot compete in that area.

Q. What was this special service?

A. Trucking.

Q. I believe you testified that there was a so-called base at Buffalo; who established that base, if you know?

30591 A. Well, the present base established at Buffalo, I believe it was established by the Huron Portland Cement Company.

Q. Was there a base at Buffalo before Huron came there in 1933, I believe you testified?

A. Yes.

Q. And who had established it before that time?

A. The Lehigh Company established the base at Buffalo.

Q. Do you consider your mill to be a base mill?

A. No, we do not consider our mill as a base mill, although our mill point, Buffalo, certainly is.

Q. Has your company ever attempted to take the leadership in establishing a new price?

A. No, sir.

Q. Would you tell us whether or not there is any understanding or agreement which prevents you from assuming that leadership?

A. No, sir; there is not. We could if we so desired.

Q. Would you tell us whether or not you would be free to establish a base at your mill if you decided to do it?

A. We would.

Q. How would you go about doing it?

A. Well, in order to make it base, we would establish —to make it effective, we would have to reduce the price below the base, or the price that is in existence there at the present time.

30592 Q. Well, why don't you have a base at your mill?

A. Well, we are trying to get as much money as we possibly can for our cement, and I know if it was left to our own judgment or our own personal feelings, we would like to establish a base very considerably higher than the one that is there today, but we can't—certainly we are not going to put one in that is lower.

Q. Is there any one of your competitors to whom you

can point and say that that specific company is the price leader?

A. No, I do not believe so. Anybody could be the price leader if they wanted to establish a lower price.

Trial Examiner Norwood: Well, are there a number of them that are so considered more or less price leaders?

The Witness: Well, I do not know. Your Honor, I could not pick out any particular one; as I say, that we could be a price leader this afternoon if we wanted to change our prices, if we wanted to make a lower price in Buffalo. We would lead out, somebody would follow undoubtedly.

Trial Examiner Norwood: Doesn't the size of the mill have something to do with it,—the size of the organization, the financial strength, and so on?

The Witness: I do not see where it would have any bearing whatsoever on it. A small mill could step out if they wanted to, or a large mill; it would not have 30593 any bearing on it at all.

By Mr. Withrow:

Q. Mr. Bates, there is some evidence in the record concerning change in base, Cleveland, Ohio, in January, 1936. Would you tell me whether or not you received that information from your competitors about this change in advance of the change?

A. No, sir. As I testified before, the first information that we had received of the changes was from the field, from our salesmen.

Q. Now, would you tell us whether or not The Cement Institute has, to your knowledge, attempted to regulate or fix or control the price at which you sell cement?

A. They have not at all.

Q. Would you tell me whether or not The Cement Institute has had anything to do in influencing prices or marketing policies?

A. None whatsoever.

Q. Now, are you free to reduce your price at any time?

A. Yes, sir.

I would like to add one statement to that. I wish I was as free to increase my price as I am free to reduce it.

Q. Why can't you increase your price?

A. Why, my competitors won't let me increase it, that is the reason.

Q. What do you mean by that, won't let you?

A. Well, I certainly cannot go out and quote a
30594 contractor or a dealer more than the price that he has already been offered by my competitors. I have certainly got to have my price equitable with my competitor's or I do not get the business, that is all.

Q. Have you ever found that you were able to sell your cement for more than your competitor sold theirs?

A. No, sir; I certainly have not.

30595 Washington, D. C.,
January 17, 1940.

30596 J. E. BATES thereupon resumed the stand and testified further as follows:

Direct Examination By Mr. Withrow (Continued).

Q. Would you tell us, Mr. Bates, whether or not the prices you quote to the Federal or State Governments are the same prices as you quote to the trade?

A. Yes, they are.

Q. Have you ever given the United States Government specially low prices?

A. No, sir.

30597 Q. Well, is the United States Government one of your largest customers?

A. They are not. They are one of our smallest customers.

30606 Q. Now, from your experience, Mr. Bates, would you tell us whether or not you found it was cheaper to sell to the Federal Government than to sell to your dealer customers and contractors?

A. No, it is not.

Q. Would you tell us whether or not you have ever run into any Government jobs where they have insisted on being present at the plant while the cement was being made?

A. Yes, we bid on a job, I believe last September, where in their specifications they stipulated that they would have a man present during the manufacture
30607 of that particular contract or the cement involved in that contract.

Q. Now, in large Government purchases, would you tell me whether or not you feel that the Government is entitled to any quantity discount?

A. No, I do not feel that they are any more than any other of our large buyers.

Q. And why not?

A. Well, simply because the Government asks for a hundred barrels of cement I do not believe they are entitled to any different treatment than several of our customers that might ask for the same volume of business.

Trial Examiner Norwood: Is the cost of sale and delivery of Government jobs any lower than the cost of sale and delivery on other jobs?

The Witness: I would not think so. I think just the contrary. Our experience has been on Government work that it costs us additional money to sell.

30608 By Mr. Withrow:

Q. Well, do you give the Government a special lower price because they pay cash on the barrel head?

A. No, because all of our cement is sold practically on the basis of cash on the barrel head.

Q. Would you tell us—you said "about all"—about what percentage of your commercial customers take advantage of cash dscount?

A. Oh, I would hazard a guess about 95 percent, 96.

Q. Would you tell us whether or not there have been any instances where the Government has not paid within 15 days and so was not entitled to cash discount?

A. Well, I do not recall any specific instance. It runs in my mind that we did have some difficulty with the Government on one, or probably two small orders that we shipped them. They seemed to take an arbitrary view on the matter—they paid us when they feel like it, and we are supposed to accept it.

Q. And when they paid you after the 15-day period did they take the discount, anyhow?

A. Oh, yes.

Q. Do you ever make sales to the Forestry Service of the United States Department of Agriculture?

30609 A. Yes, sir; we have.

30611 The witness identified Resp. Ex. 2094-A to E
30612 as a copy of the bid that Federal submitted to the Department of Agriculture; Resp. Ex. 2095 to 2111

as the file pertaining to this proposal. He was familiar with this transaction at the time, and those papers in his file were prepared in the regular course of the Federal Portland Cement Company's business.

Mr. Withrow: Your Honor, at this time I offer in evidence this file, all of these papers, 2094 through 2111 (handing the documents to Commission's Counsel).

30615 Trial Examiner Norwood: Whether self-serving or not, there are statements here of people who are not on the stand for cross-examination, and if this was possible, unless it was part of something already in evidence, and you show me that, I think that will put them on a different basis. Now, I think if there is anything in here that tends to go to those points, that this witness can tell us about them.

So I shall sustain the objection to everything but these invitations here. They are not admissible unless they relate to a bid that has been shown, by the Commission.

Let this witness tell about those difficulties.

30616 Go ahead.

By Mr. Withrow:

Q. Mr. Bates, I believe you testified that you recall this invitation from the Department of Agriculture. Is that correct?

A. Yes, I did.

Q. How do you receive those invitations to bid?

A. Well, we are usually on the mailing list of those various departments, and when they are asking for proposals on cement we receive one at our office.

Q. Then, what is the first step that happens in your office after you receive such an invitation?

A. Well, when we receive the invitation we determine what the mark-up price is at that point and prepare the bid and submit it to that particular agency. About the same time we notify our representative who covers that particular area that we have submitted such a bid.

Q. Does anyone in connection with your company make any attempt whatsoever to be present at the opening of the bid, or anything like that?

A. Oh, yes. As I say, we notify our salesman that we have a bid on a certain proposal and we give him the information as to the date of the bid, where the proposal

will be opened, what time it will be opened, and we expect that representative to be present when it is opened,
30617 if it is at all possible, and of course he does make it a point to be there.

Q. All right.

Now, how are you notified as to whether or not you are a successful bidder?

A. Well, if our salesman is present, he can tell us if the bids are awarded at the time they are opened.

30618 Q. Mr. Bates, would you tell us whether or not on any of the times you received an award by the Federal Government the price of cement has gone up at the destination where you bid and you continued to sell at the lower price?

30619 A. Yes. That was particularly true during the time we had the emergency freight rate added to our tariffs.

Trial Examiner Norwood: Is that any different from what happens when you sell a contractor?

The Witness: No, we have the same, as far as the freight rates are concerned.

By Mr. Withrow:

Q. When the contractor has a specific job contract?

A. That is right, when we have a contract, and that is what I presume you are talking about there; we have a contract with the Government.

30624 Q. Would you tell us, Mr. Bates, from your own knowledge and experience, whether or not in the sale of cement you have found that you have to perform the same services and exert the same amount of sales effort in making sales to the Federal Government—at least as much sales effort in sales to the Federal Government as you do in sales to any of your commercial customers?

30625 A. Yes, I would say we do perform the same; at least the same and more.

Q. Now, has your company ever withdrawn or requested the right to withdraw any bid made to the Federal Government or to a State Government?

A. Not to my knowledge, they have not.

Q. Now, do you sell any cement in territory where you find land-grant rates?

A. No, sir.

Q. Have you ever used the so-called control clause?
A. No, sir; I have not.
Q. Would you tell us whether or not you have ever entered into any agreement with anyone to deprive the Government of the full benefit of the land-grant rates in any way?
A. Well, we do not have any land-grant rates in our part of the country, and I know nothing about them whatsoever.
Q. Have you ever entered into an agreement with anybody about them?
A. No, sir.
Q. Do you bid on highway requirements in New York and Pennsylvania?
A. Well, that is not— You ask me whether we bid to the State?
Q. Yes.
A. No. In Pennsylvania and New York State
30626 the contractors purchase their highway requirements.
Q. And do these contractors in these instances ask to purchase cement f.o.b. mill or f.o.b. destination?
Q. Now, Mr. Bates, would you tell us whether or not it was your practice during the N.R.A. Code period to file prices with the Code Authority?
A. Yes, sir; it was.
Q. And would you tell us whether or not during the Code period it was your practice to bid on invitations for sealed bids the lowest price on file with the Code Authority?
A. Yes.
Q. Now, do you have any policy regarding the diversion of shipments in transit?
A. Yes, we do.
Q. As to this question of diversions, has this question been a very important one to you?
30627 A. Well, it has not affected us too much, but we have a very well defined policy on diversion of cement.
Q. And would you tell us what steps you take to prevent diversion, if you take any?
A. Yes. On our bill-of-lading we have a stamp that we so notify the railroad that the cement is the property —ours—until it reaches the destination to which it is con-

signed. That is not the exact wording, but that is the substance.

Q. When did you first use that stamp?

A. During the Code.

Q. And why did you start to use that stamp at that time?

A. Well, it was a provision of the Code not to permit diversions of cement, and we, of course, went along definitely on our Code.

Q. Now, would you tell us whether or not you entered into any agreement with your competitors to prevent diversions?

A. We did not.

Q. And did you adopt—will you tell us whether or not you adopted the use of the provision or stamp on your bill-of-lading as a part of an agreement with your competitors to discontinue diversion?

A. No, sir.

Q. Now, when the Federal Company first began marketing cement in 1933, and before the Code became effective, did you have any policy at that time regarding diversion of cement?

30628 A. Oh, yes, we have always had a policy regarding that.

Q. Did you have any special provisions or any way of dealing with that problem prior to the Code time?

A. Well, we had no special stamp or bills of lading, but if we were suspicious of anybody making diversions of our shipments we had our men check it.

Q. Now, what was the purpose of this policy of refusing to allow diversions?

A. Well, the purpose of that policy was to prevent dealers in adjoining towns from selling cement in territory where we were protecting our customer. I will probably illustrate that by, for instance, take Conowanda, N. Y., against Buffalo. We protect our dealers in the Buffalo market—that is, we will sell the Buffalo dealers for jobs in the City of Buffalo. We also have a dealer in Conowanda. Unless we do offer that protection in the sale of our product he is certainly going to discontinue buying from us.

Q. Do you allow trucking from your mill, Mr. Bates?

30629 A. Oh, yes.

Q. Can any customer who desires to come to the mill, come to the mill and truck some cement?

A. Yes, we have not refused anybody.

Q. Now, do you hire truckers to take the cement to the point of use or to the dealer's warehouse?

A. Yes, sir.

Q. Does your company own any trucks?

A. No, we do not.

Q. Mr. Bates, let's take some specific point like Oswego, N. Y., how does the cost of shipping cement by truck
30630 from your mill to Oswego compare with the rail cost of shipment to Oswego, if you know?

A. It is considerably more from Buffalo to Oswego by truck than it is by rail.

Q. Now, do these truck companies that truck for you have any special equipment for trucking cement?

A. No, there is no special equipment in Buffalo, as yet. Those trucks can be used for hauling any materials.

Q. Well, do you truck both package cement and bulk cement, or only package?

A. Both, package and bulk.

Q. Now, would you tell us, Mr. Bates, if your mill at Hamburg was constructed so that trucks could be loaded economically?

A. Yes, when the plant was built there was a provision made for trucking.

Q. Approximately what percentage of the cement you ship each year is shipped by truck from your mill?

A. Well, Mr. Withrow that varies from time to time, from year to year,—a year where we would have considerable highway construction around our plant of course our volume of trucking goes up considerable. I would say, a mean average probably, since we have been in business, oh, around 40 percent.

Q. And do your competitors also truck in that
30631 area up around your mill?

A. Yes, indeed.

Q. Do you have a 15-cent extra charge for loading trucks for truck delivery?

A. No, sir; never have.

Q. Do you ever enter into any agreement with your competitors to impose a 15-cent extra charge on truck delivery?

A. No, sir.

Q. Did you ever enter into any agreement with any of your competitors to discontinue trucking?

A. No, sir.

Trial Examiner Norwood: Do you make any sales f.o.b. mill delivered to trucks?

The Witness: As I said yesterday, Your Honor, we do sell cement f.o.b. the plant, but it is sold on the destination price of the particular customer who comes into our plant to get it. We do not particularly like that type of business, however.

By Mr. Withrow:

Q. Well, would you tell us briefly why you do not like that type of business?

A. Well, I would say it is a nuisance, to begin with. A customer might come running into your plant all out of breath and want two or three barrels of cement; he might want five or ten barrels of cement. Now, in our 30632 regular days' business we have probably a half a dozen truck orders that are scheduled to reach destination at a certain time, or to leave our plant at a certain time. This little customer comes in, buys f.o.b. your plant, he runs into your plant and wants to be waited on immediately. If you do not do it, he will come into our office, abuse our office people, and it does not stop there. The next time our salesman calls on him he tells that particular salesman what a swell company it is, he lost two or three hours' time, when it might be a half hour. You have to take those trucks in turn. I have yet to see a customer come into the plant for a small quantity that he did not think he was the only one in line, and he should be waited on immediately. I do not like it.

Q. Now, I believe yesterday you told us that there was considerable trucking around Oswego, N. Y. Would you tell us whether or not you would have to truck in order to meet that competition around Oswego?

A. Yes, we certainly would, because I think for the majority of the cement in Oswego, the sale is predicated on the service of trucking.

Q. Now, you have testified that the rail rate was also the truck rate to points like Oswego. How does it compare, say, in Erie or Niagara County?

A. Well, I would say if you averaged the two counties

you probably have a fifty-fifty break; it about equals
30633 the rail rate except on our particularly short hauls.

Q. Now, is all of the cement that you ship around your mill and Erie and Niagara Counties out there delivered by truck?

A. Oh, no.

Q. How much do you ship in that territory right around your mill by truck?

A. Oh, I would say that that would probably run about 80 percent.

Q. Now, when you deliver cement by trucks which you hire, do you deliver any amount?

A. Oh, no. We established an amount commensurate with the type of equipment we have; that is the minimum amount, 40 barrels, is the minimum in Buffalo.

Q. Now, have you always used this 40-barrel minimum?

A. Yes. I inherited that, of course, back in 1933 when I took charge of the sales for the Federal Company; that 40-barrel minimum had been established prior to that.

Q. You found that in the market?

30634 A. That is right.

Q. Now, do you deliver by truck to the job site, or only to the dealer's warehouse?

A. At either one.

Q. Now, in the case of the specific shipment, who decides whether the cement will be delivered by truck or by rail?

A. The customer.

Q. Now, from your experience, what has been the maximum radius that trucks can cover economically from your mill?

A. Well, I would say not over 40 miles.

Q. And how much of your total output is marketed within this 40-mile radius?

A. Well, considerable. I do not know what the figure would be. I would say probably 50 percent of our business, something like that.

The witness identified Resp. Ex. 2112 as having been prepared under his supervision. He could vouch for the accuracy of those figures.

30635 (RESP. EX. 2112 was offered and received in evidence.)

Q. Now, you have testified that you never refused to

sell to a customer who came to the mill to take some cement. Has there been a great demand by your buyers to come to your mill, and for this privilege of taking it in trucks at the mill?

A. No, it has not amounted to a great deal of business. I think probably the reason for that is we attempt to discourage it at every turn of the road that we can.

Q. Well, under what circumstances or situations does a dealer come to your mill with trucks, if you know?

30636 A. Well, of course, invariably, it is emergency, at least in the mind of the dealer, and he will come into our plant, or he might call us up and say, "Get me 40 barrels of cement here in 15 minutes; I have got a contractor going to knock my head off because the job is going to be shut down," and so on; and, of course, he expects us to have a truck all loaded and ready to shoot the gun so that truck can be down there in 15 minutes.

Trial Examiner Norwood: I would like to know your attitude as to the relevancy of all this information about shipping by truck where the goods are sold on destination price based on rail. Does that meet any issue whatsoever.

Mr. Withrow: Yes. As I recall, the complaint is rather specific that this Respondent, and every other Respondent, agreed to discontinue trucking, and the mere fact that he trucks meets that issue in part.

Trial Examiner Norwood: I do not think it meets it in the way that it is alleged there.

Mr. Withrow: The complaint says nothing about, Your Honor—nothing about—

Trial Examiner Norwood: It is very clear what he means by trucking.

Mr. Withrow: But the complaint says nothing
30637 about selling cement on a delivered price basis and allowing trucking of cement. There is no such allegation in the complaint. The charge is that in order to maintain a certain pricing system we agree to discontinue trucking, had, in fact, discontinued trucking. Well, that is not the fact as has been abundantly brought out in evidence in this case.

Trial Examiner Norwood: If the allegation were the way you seem to understand it, it would be irrelevant because it would not be a violation of any law, as I see it.

Mr. Withrow: Well, I do not know what Your Honor means. I do not think that—I mean I am not here pre-

pared to discuss whether or not their allegations in the complaint are correct. The issues are joined on those allegations, and the issue is whether or not we have conspired not to truck, and whether, in fact, we do not truck. Now, the fact remains that this witness and his company allows trucking, and he has a policy about it, and he does it under various circumstances, and I want to show how this policy operates, and why he does what he does.

Trial Examiner Norwood: Well, I think it irrelevant unless he shows that he is not shipping it on a delivered price basis.

30638 Mr. MacIntyre: Your observations, Your Honor, were very apt, in my opinion. The allegations are that they did refuse to truck. The proof under that allegation is that they refused to truck except on certain conditions. Now, the only thing that they are doing is adding to our proof that they did refuse to truck except on certain conditions.

Now, while I am still on my feet, I want to move to strike the witness' last answer in that it is not based as to facts, but upon what he might do if certain things happened.

Trial Examiner Norwood: Read the question and the answer.

(Question and answer read.)

Mr. MacIntyre: Now, beginning with those words, "He might call us up"—

Trial Examiner Norwood: I shall deny the motion. I think it deals with a situation there that may add to the record.

Go ahead.

But I think in view of the time we are taking on the situation here, I shall have to rule that testimony—that is, details as to trucking cement sold on a delivered price basis based on rail are irrelevant. We are taking too much time.

30639 Mr. Withrow: Perhaps I can save a little time, in view of the fact that Mr. MacIntyre, apparently wholeheartedly, agreed with your statement.

If the Federal Trade Counsel for the Commission is now willing to agree that the question of a conspiracy, or an agreement to discontinue trucking is not in issue in this case, except an agreement to use a delivered price calculated on the basis of rail freight, why, then, we can dis-

pense with any proof whether this witness does truck, how he trucks, and everything else.

Trial Examiner Norwood: Yes. I do not think they charge anything—

Mr. Withrow: Now, if they are willing to agree to it, I won't pursue it any further.

Mr. MacIntyre: I do not think I will add to the statement I have on the record. I think it is clear.

Trial Examiner Norwood: I think it is clear, and I will rule this irrelevant hereafter.

The Counsel has been charged with conducting what has been termed an administrative filibuster. I think he should try to avoid justifying any such charge as that.

Mr. Leisure: I think there has been an awful lot of this talk in this hearing that has been totally unjustified. I think the record will show it very plainly as we go along.

I think the attempt has been to keep out evidence
30640 under the guise of that umbrella, and I am perfectly satisfied with what the record is showing in that direction.

Now, it seems to me that this kind of evidence,—Mr. MacIntyre, in his objection, said that we were merely adding to their proof in doing this. Well, I submit that if the Counsel for the Commission were allowed to put it in, I know of no rule of evidence that says that we cannot put it in also.

Mr. MacIntyre: Accumulation.

Trial Examiner Norwood: It becomes cumulative after a while.

Mr. Leisure: Well, if that is the reason it is being kept out, I think the record ought to show that, too. But it seems to me that it is very clear that when you have one company on the stand, with the allegations that have been made about conspiracy in trucking, that this company, if it is allowed to put in any defense, it should be allowed to take itself out of that conspiracy if it can do so, and that is what these questions are directed to.

Trial Examiner Norwood: Yes.

Mr. Leisure: Clearly, if you allege that certain companies got together and did not truck because of conspiracy, then if another company comes on and shows that
30641 it, not only did not get together, but it is still trucking, then whatever findings may be made they will not apply to that company.

Mr. Leisure: I think there are other relevant facts,—the witness is giving his experience as to trucking, and we have already developed in certain other instances what other people's experiences were with trucking.

Trial Examiner Norwood: If you can show that he has trucked in the way that the Commission alleges he did not truck, then that meets it; but you are showing that he
30642 has trucked in the way that the Commission alleges he did truck. You are just proving the Commission's allegation.

Mr. Leisure: You discussed that with Mr. Withrow, and I think there is some difference of opinion on that.

Trial Examiner Norwood: Yes.

Mr. Leisure: But the point I was trying to make clear now is that if this witness had certain difficulties with trucking, that goes to this general picture as to whether the companies that did discontinue trucking did it because of these difficulties which he has experienced, or because of the alleged reason, conspiracy; so that the difficulties that he has with trucking seem to me to be material and relevant.

Trial Examiner Norwood: I think it is all very clear.

By Mr. Withrow:

Q. Mr. Bates, would you tell us, if you know, whether or not there is any difference in cost of handling cement which you ship by rail and cement which you ship by truck?

A. Yes, there is. There is an increased cost in trucking.

Q. And about how much does that amount to, if you know?

A. Well, we determined about 6 cents a barrel at our plant.

Q. How did you arrive at that figure of 6 cents a barrel?

A. Well, it is the cost of the sale of cement in
30643 smaller-than-minimum-carload quantities. It takes our representatives just as long to sell a 40-barrel order to a customer as it does to sell a 200-barrel car or a 300-barrel car. It means just as much billing for a truckload as it would for a carload. There is lost time in your packing house when you pull your packers from loading cars until you put them to loading a truck. And just cumulative differences there that go into that cost.

Q. Now, would you tell us whether or not any of your

customers has expressed a preference for delivery by truck or for delivery by rail?

A. Well, we, of course, have some of our dealers object to trucking; and, of course, we will find customers who like it. And whatever they want in the matter of getting the cement we agree to. If they want to truck it, we truck it. If they want it in carload lots, we ship it in carload lots. There are dealers who will never take a truckload of cement.

Q. Have any of your dealers requested you to discontinue trucking?

A. Yes, we have requests from dealers to discontinue trucking. It is not so much lately as we had when we first started in business.

Q. Well, have you ever agreed with any group of dealers to discontinue trucking?

A. No, sir.

30644 Trial Examiner Norwood: Did they request you not to ship the cement to them by truck when it was sold on a rail basis?

The Witness: Well, there are some dealers who—they won't request you not to ship cement to them; they just tell you they won't buy it in truckload lots.

Trial Examiner Norwood: Well, what reason did they give for that?

The Witness: Well, their purpose in not wanting it trucked, I think, was they had an idea it would develop into the general elimination of their services as a dealer to the customer, and I think that is—

Trial Examiner Norwood: They wanted it delivered on the job in their own truck?

The Witness: That is right. The dealers perform the service and trucking is just a means, according to their story, of eliminating their entire picture in the distribution of cement to jobs.

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. Have you ever received any resolutions from the New York State Builders' Supply Association urging you to discontinue trucking?

A. I do not recall of any resolutions that we received.

Q. I show you Commission's Exhibit 420-4-E

30645 through 4-G, and ask you if you remember receiving this?

A. No, I do not recall. If we received it, it probably went to the scrap heap.

Q. Did you take any action on this?

A. No, sir.

30656 Q. In order to save the trouble, Mr. Bates, of identifying a number of these, will you tell us whether or not that letter is typical of such protests you received from dealers, associations of dealers?

A. Yes. We received a number of letters from dealers in different parts of our territory that we serve, dealers who were outside entirely of the trucking area, that due to the weight of their business they urged upon us to discontinue trucking, and we paid no attention whatsoever to any of those requests.

Trial Examiner Norwood: You refused to discontinue trucking?

The Witness: Right. The truth of the fact is we started trucking when we started to sell cement; we are trucking today and we will be trucking tomorrow undoubtedly.

By Mr. Withrow:

Q. Now, Mr. Bates, did you ever attend any meetings with competitors at which an agreement to discontinue trucking was discussed?

A. No, sir.

30657 Q. Is the trucking policy at your mill the result of any agreement or understanding with any of your competitors?

A. No.

Q. Would you tell us whether or not your trucking policy has been influenced by any agreement or understanding with the railroads or dealer or dealer associations?

A. It has not.

Q. Has your company ever been interviewed by any representatives of railroads with respect to trucking?

A. Not to my knowledge. That, of course, would probably come through the channel of our traffic man, and I had not heard about it.

I do not recall of any interviews whatsoever.

Q. Now, Commission's Exhibit 1010 shows that the Trade Practice Committee of The Cement Institute sent an announcement to the Federal Company stating that new trucking terms had been filed in September, 1935, showing 5 cents added charge at Oswego. Do you know whether that

was the first information which you had concerning this change, or whether you had got the information in the field prior to that time?

A. We got the information in the field prior to that time. I am sure—I think we picked up quotations from our salesmen sending in the information.

30660 Q. Mr. Bates, would you tell us whether or not it is customary for salesmen to report or send in the announcement of your competitors about trucking?

A. Yes, indeed, or any announcements they find in the field from our competitors.

Q. Would you tell us whether or not that would include quotations showing such matters as minimum truckloads delivery for use by your competitors?

A. Oh, yes. They would give us a complete report on just what the announcement contained, or send in the announcement; that is what we prefer to have.

The witness identified Resp. Ex. 2118 as having
30661 been received in the regular course of business from Federal's representative, Mr. Signer; Resp. Ex. 2119 as a memorandum prepared by him in the regular course of business and sent to all of Federal's representatives; Resp. Ex. 2120 as having come to his attention from a Federal salesman up in the Oswego territory; it was received in the regular course of business; Resp. Ex. 2121 as having come to his attention. Those are his initials; it came from Federal's representative and was received in the regular course of business. He further iden-
30662 tified Resp. Ex. 2122 and 2123 as having been received in the regular course of business. He has initialed one; his initial doesn't show on this other, but he does recall this. They are from two different salesmen, one from Mr. Signer and one from Mr. Dahl.

Mr. Withrow: Your Honor, I offer at this time in evidence Respondents' Exhibits 2118 and 2123, for identification.

Mr. Paulson: Your Honor, I have heard absolutely no foundation for this offer; therefore, cannot determine the materiality or relevancy. Before I bother myself to read them I would like to have a statement of foundation, at least.

Trial Examiner Norwood: What are they?

Mr. Paulson: Well, I do not know and I do not care to look until I hear some foundation.

Trial Examiner Norwood: Letters and statements from his salesmen in the field; is that right?

Mr. Withrow: Well, Your Honor, I do not understand when I offer documents that I have to make an offer of proof on every set of documents.

Mr. Paulson: I have not asked for an offer of proof. I said there is no foundation.

Mr. Withrow: I have no objection to assisting
30663 Counsel for the Commission, but the documents speak for themselves. They show the manner in which this witness and his company follow the truck competition which they meet from their competitors. It tends to negative collusive action and to show the independent and individual action of this Respondent.

Trial Examiner Norwood: They consist of statements of salesmen who received the following statements from customers, and so forth; is that right?

Mr. Withrow: Well, they are reports by salesmen to this man. In one instance, there was a quotation attached. It has been separately identified.

Trial Examiner Norwood: And what do these reports show?

Mr. Withrow: Well, as I just said to Your Honor, they purport to show—

Trial Examiner Norwood: You are saying generally, but specifically, particularly, what do they show? What do they prove? What evidentiary value have they? What do they establish?

Mr. Withrow: The manner in which this company finds out about changes in the truck competition which they want to know about and which they meet, and the manner in which they do it, and we will bring out further testimony as to why and how he meets those specific changes.

30664 Trial Examiner Norwood: Don't you think that is cumulative? He has already told us about how they meet the truck competition.

Mr. Withrow: Well, Your Honor, I just recall several witnesses back where Counsel for the Commission attempted to cast inferences to the effect that this information was not gotten in this manner.

Now, as a result of that I am very much interested in proving the precise manner in which this information came to the attention of the witness and his company. In other

words, not by calling up on the telephone and going to a meeting, but by having his salesmen get the information about this trucking, constantly checking what competitors were doing, the independent action of this company.

Trial Examiner Norwood: It just occurs to me that you are proceeding in this way—for instance, if you want to establish that all men are mortal, you begin by proving that all men in Montgomery County, Md., are mortal, then asking if all black men are mortal, and all brown men are mortal, everybody in Georgia is mortal; then you can go on ad infinitum. Then after you get through you want to introduce documentary evidence that somebody is mortal, some particular person is mortal. Now, I am going to stop that method.

30665 You are wasting time. It is an administrative filibuster, in my opinion. You have stacks of questions there that are prepared by somebody else. It seems to me that Counsel could use his judgment here and could go directly to these issues, and we have not the time to waste in the way you are wasting it.

Mr. Withrow: Well, Your Honor, I wish somebody else had prepared these questions. Unfortunately I had to labor through that, and I did it myself, and I could have asked many more questions; as a matter of fact, this morning I have omitted a great number in an effort to save time, and I have not had identified numerous documents which, in my opinion, are material and relevant to these issues, but in obedience to Your Honor's request I have attempted to curtail this as much as possible.

If Counsel for the Commission are willing, on some of these things, that you and I are in agreement about, to stipulate that they would not attempt to draw any inferences such as they attempt to draw from time to time, we could save an abundance of time, but they, every single time, have been unwilling to do so.

Trial Examiner Norwood: You cannot base your theory on what they think.

Mr. Withrow: But we have to meet them.

Trial Examiner Norwood: Just base it on law

30666 and logic and drive straight to the point and show your case. They may make many irrelevant arguments and observations in this case. We are just human. But it is time to drive straight to the point. The administrative process goes to the merits. It tries to stay mid-

way between excessive official zeal and obstructions and technicalities.

Mr. Withrow: Well, I offer to prove through these documents, and through the testimony based on these documents, that this company,—salesmen for this company,—pick up quotations and general information concerning the change in the trucking situation. These salesmen
30667 then reported to the witness on the stand; that these documents referred to the institution by the Huron Portland Cement Company of trucking service in the territory covered by its plant at Oswego, and that these quotations were picked up and reports made so that the Federal Company determine whether or not they would meet the competition of the Huron Company, and what the scope was of the change made by the Huron Company, and that this company received none of the information concerning this or any other change in trucking from competitors by any conspiracy or agreement as alleged or proved.

Trial Examiner Norwood: Now, I do not see anything that those papers could possibly contain that would prove that last statement there.

30668 Mr. Withrow: Your Honor, I would like to point out that when Counsel for the Commission were introducing their case they saw fit to raise this question and this specific change at Oswego, N. Y., and put in evidence about it, and this company can only meet that evidence by showing what information it had about it, and all the facts surrounding it.

Mr. Paulson: I think Your Honor should not only limit these offers of evidence, but should also draw a line in this testimony. Your Honor will recall this witness was permitted to testify as to the policies of his company, namely, that they picked up quotations in the field. There is no exception made in his testimony. Counsel sought to draw no distinction on the trucking prices as against the rail prices,—negotiations,—and so far as these exhibits go, and the testimony now goes, it is simply a re-hash of what we listened to all day yesterday.

Trial Examiner Norwood: I think so.

30671 By Mr. Withrow:

Q. Mr. Bates, there is some testimony in the record about Huron instituting trucking at Oswego.

Could you tell us whether or not you received your information about that from any competitor of yours?

A. No, we did not.

Q. Have you ever announced a marketing policy?

A. Yes, back some years ago we announced a marketing policy.

Q. Well, when did you announce the marketing policy which you are using at the present time, if you recall?

A. Well, the marketing policy we are using at the
30672 present time is the same as our policy was under the Code, or very similar to the policy under the Code.

Q. Now, do you have a strict hard and fast concept of what constitutes a cement dealer or dealer to whom you sell?

A. Well, we have our own ideas of what a dealer is. It is flexible, though. It depends on where the—on who you might be considering as a dealer, in what town he is located, and what the surrounding conditions are.

Q. Would you just tell us briefly what your concept of a dealer is?

A. Yes. Our dealer is a merchant who handles a line of building supplies commensurate with the community that he is doing business in; he is financially able to perform the services of a dealer, and maintains, of course, a warehouse and delivery service, and adequate supplies.

Q. Why do you sell through dealers at all?

A. Well, we sell through dealers to eliminate the necessity of our putting warehouses in each one of these markets that we attempt to do business in.

Q. Now, would you tell us whether or not you have ever been influenced in your decision as to whether someone is a dealer by the fact that your competitors have or have not considered certain persons to be dealers?

A. That would have no bearing on our decision, whatsoever.

Q. Would you tell us whether or not you have
30673 ever sold to a dealer which, to your knowledge, is not sold as a dealer by any of your competitors?

A. Well, yes, I would say we have some dealers who are exclusively Federal dealers and we probably have—well, we do have one particular dealer I have in mind that probably would not be sold by any other company; at least, they have never sold them.

Q. Would you tell us whether or not your competitors have ever sold to persons whom you won't sell as a dealer?

A. Yes, they have.

Q. Now, would you tell us whether or not you have ever sold a man as a dealer when he was not recognized by other dealers of yours to be a dealer?

A. Oh, yes.

Q. Would you tell us if you have ever been criticized by dealers for sales to other dealers?

A. Oh, well, you get a certain amount of criticism no matter who you would sell; if you would sell probably the Lord somebody would criticize you.

Q. Well, is this—

A. Nothing stands out in my mind right now.

Q. Have you ever refused to sell other dealers because of any agreement with dealers, or dealer associations about what constituted a recognized dealer?

A. No, I have not.

30674 Q. Or have you ever refused to sell to some company, or discontinued some company as a dealer, because of any criticism you have received from your dealers?

A. No, not because of any criticism.

The witness identified Resp. Ex. 2124 as a letter received in the regular course of business from one of their large dealers in the City of Rochester, New York. It is typical of the kind of complaints received from dealers about selling to other dealers. Most of the complaints come in verbally. The writer of this letter is one of their customers. The handwriting in the lower left hand corner of the
30675 letter is that of witness. They continued to sell the dealer complained against after receiving this letter.
30678 (RESP. EX. 2124 was offered and received in evidence.)

Q. Now, in making sales to dealers or choosing your dealers, would you tell us whether or not it makes any difference to you whether a man is a member of a dealer association or building supply association?

A. None whatever.

Q. And have you received from building supply dealers' associations lists of what they call recognized dealers?

A. No, I have not. I do recall back in the early days of the Code—I think in Erie County—there was such a list sent around. We did not receive a copy of it, however. I did see the list in one of the dealers' offices.

Q. Well, Mr. Bates, there is some evidence in the record of the existence of a publication by the name of New York

State Builders' Supply Association as sort of a directory of cement dealers. Have you ever purchased a copy of that directory?

A. No. There was such a publication, but we never had any use for it.

Q. Did you ever use it in any way?

A. Not at all.

Q. Would you tell us whether or not you ever refused to sell to a dealer solely on the basis that he was not a
30679 member of the building supply dealers' association?

A. No, that made no difference to us at all.

By Mr. Withrow:

Q. Now, have you ever received complaints from dealer associations that you were selling to persons who were not qualified as dealers?

A. Yes, we have probably received such complaints.

30684 Q. Now, do you have dealers who deal exclusively in your cement?

A. Yes, we have a few.

Q. Would you tell us whether or not you sometimes limit your sales in a given town to one dealer, although there are a number of dealers in that town?

A. Yes, we will do that, depending on the size of the town. We attempt, of course, to go in there and get the best possible connection we can, and we might not be able to do that at the beginning of our solicitation in that particular town. Now, we have gone into towns,—we might have an exclusive dealer,—and we might open up the matter in a particular place. It all depends upon the conditions that we find, what the history of the account we have been selling is.

30685 Q. Do you have a rule as to how many dealers you will have in any given town?

A. No, we do not.

Q. Mr. Bates, I show you Respondents' Exhibit 2130, and ask you to tell me what it is (showing document to witness)?

A. Yes, this is a report from one of our salesmen, a dealer report, and he is reporting on a bid in a particular town, of three cars of cement, that the dealer was bidding for us.

Q. Do you make such reports on all of your transactions?

A. Oh, yes. These are daily duties of a sales
30686 man; he reports everything to the office.

Q. Do you also have reports from your salesmen concerning the nature of a dealer account that you are soliciting,—I mean, showing credit, and the products he carries, and so forth?

A. Oh, yes, we want all the information; we want to know the competitive brands he is carrying, and how much cement he handles, and what his general reputation is in the town, and how does he do business, is he aggressive,—and just a lot of information.

Q. Now, do you sell all of your business through a dealer?

A. No, some of it we sell directly to the consumer.

Q. Well, whom else do you sell direct?

A. We sell the United States Government, we sell State departments, and we sell State highway contractors.

Q. How about concrete products concerns?

A. Concrete products plants of all types.

Q. Do you have a policy concerning such sales?

A. Yes, we do.

Q. Did you issue any printed announcement of your policy on this matter when you started doing business in 1933?

A. No, we didn't issue any printed announcement
30687 to the trade on that; we more or less generally followed the policy under which we had been operating under the Bessemer Limestone—or Bessemer Cement Corporation.

Q. What was the first written policy that you operated under, as you recall—I mean, with the Federal Company?

A. The policy that was incorporated in our Code was the policy that we followed.

Q. By "our Code," do you mean the N. R. A. Code?

A. That's right.

Q. And was the part of the Code you refer to, Article XI?

A. That is right.

Q. Was that suspended at any time?

A. Yes; I can't tell you when.

Q. What did you do after it was suspended?

A. We followed that same method of policy, generally.

Q. Why did you follow it?

A. Because we felt that's the way cement should be sold.

Q. Did you follow it as the result of any agreement with any of your competitors?

A. No, sir.

30688 The witness identified Resp. Ex. 2131 A and B as an announcement dated February 23, 1935 made to their trade on their established policy. That was the first announcement they made after the suspension of Article XI.

(RESP. EX. 2131-A and 2131-B was offered and received in evidence.)

30691 (RESP. EXS. 2132-A, 2132-B, and 2133 were offered and received in evidence.)

By Mr. Withrow:

Q. I believe you stated that the Empire Builders' Supply Company was one of your dealers.

Did this dealer continue to purchase cement from you after complaining about your marketing policy?

A. Yes; we are still selling the Empire Builders' Supply.

Q. Did you adopt your new marketing policy of February 23, 1935, as the result of any agreement with your competitors?

A. No, sir.

Q. Or as the result of any agreement with dealer associations or dealers?

A. No, sir.

Q. Did the dealers dictate to you what this policy should be?

A. No, sir.

Q. Now, would you tell us whether or not you issued your marketing policy in February, 1935, you picked up any announcements of marketing policies issued by your competitors?

A. Yes, we had. On this particular announcement, I think my memory is right on this, a dealer, a very good friend of mine in Buffalo, immediately upon receipt
30692 of the policy from a competing company, called me up, and I jumped in my car and was over in that dealer's office within probably 10 minutes to look that policy over, and that's the result of it.

Q. Had you picked up any other announcements by other companies prior to the time of issuing yours, if you recall?

A. Well, I picked up the announcements at this particular time from one of our chief competitors, and that is the reason I was interested in meeting the situation.

The witness identified Resp. Ex. 2134 as a paper that came to his attention. His initials are on there. The handwriting in the upper left hand corner was that of Federal's salesman, Signer, who apparently picked it up from his dealer at Fayetteville, New York. This picking up in the field is typical of the way other announcements were picked up in the field at the time. That is the standard procedure when there is a change in the market, Federal's men are picking up this evidence and sending it to our office.

30693 (RESP. EX. 2134 was offered and received in evidence.)

30694 Q. Now, in the second paragraph of Respondents' Exhibit 2131-A, and B, would you look at that second paragraph, and I will ask you whether that is your statement, or whether you copied that statement from an announcement of one of your competitors?

A. No, I copied that.

30695 Q. What did you understand by it when you adopted it and used it in your policy,—2131-A and B?

A. Well, it was a statement that one of our competitors had made to the dealers, and we wanted to be just as—in just as fair position competitively as our competitor, so we made the same statement as they did.

Q. Now, was there any special need for the announcement of sales and marketing policy in February, 1935?

A. Well, the dealers all over were wondering what was going to happen since the Code had been eliminated; that is, Article XI of the Code, and we had run into many casts where a dealer thought that all the cement should be sold through him regardless of where it was, and inasmuch as they were clamoring for a policy and they wanted to know how we were going to sell after that time, this is the announcement that clarified that position; at least, they accepted it as such.

Q. Did you ever revise that sales policy?

A. Yes, it was revised after a time.

Q. Do you recall about when?

A. Well, it seems to me about a month after this

30696 one, or some time in April, I believe.

The witness identified Resp. Ex. 2135-A, B as the revised sales policy that he spoke of. It was issued by

his company and sent to all their dealers and to all their prospective dealers.

30697 Trial Examiner Norwood: And you did actually carry this revised policy into effect, did you?

The Witness: Yes, we did.

(RESP. EX. 2135-A and 2135-B was offered and received in evidence.)

By Mr. Withrow:

Q. Why did you send out this announcement in April, 1935?

A. Well, as I read that announcement, it made 30698 some additional concessions to the dealers that they had been clamoring for, and the minute that I picked it up—the minute I picked up our competitor's announcement, I did not want him to be in any more advantageous position with our dealers than we were, so as soon as we got the mechanics of the thing, I issued the same announcement.

Trial Examiner Norwood: You mean that then your revision was based on another policy received from another competitor?

The Witness: That is right.

Trial Examiner Norwood: I see.

The Witness: So that we would be in the same competitive position as he was.

Trial Examiner Norwood: I see.

By Mr. Withrow:

Q. Well, you mentioned some concessions to the dealers. Do you remember what concessions were made to dealers in these policies?

Mr. MacIntyre: Your Honor, we object. The February and April announcements are in. They show what differences, if there are any, between the two; what the dealer got, if anything, in one as against the other.

Trial Examiner Norwood: The objection is sustained.

By Mr. Withrow:

Q. Well, were your dealers, Mr. Bates, entirely 30699 satisfied, or were they dissatisfied with your February, 1935, announcement?

Mr. Paulson: We object. He would have to get the dealers' reaction from the dealers.

Trial Examiner Norwood: The objection is sustained.

By Mr. Withrow:

Q. Did any of your dealers, Mr. Bates, ever tell you what their reaction was to your February, 1935, announcement?

A. Yes.

Mr. Paulson: I object, Your Honor; immaterial.

Trial Examiner Norwood: Sustained.

Mr. Withrow: Your Honor, I thought that the law was clear that a man could testify as to what his dealers had told him concerning his trade or marketing policies.

Trial Examiner Norwood: Provided it is relevant and material, or has any possible bearing on the issues of the case.

Mr. Withrow: Well, it does, Your Honor, because one of the issues raised in this case is as to these methods, the sales methods employed by this and the other Respondents. Now, here, a change in policy was made.

Trial Examiner Norwood: And also provided it is not cumulative, and it has not already been covered.

Mr. Withrow: Well, certainly, no one has testified as to what the reactions of the dealers of the Federal 30700 Company were.

Trial Examiner Norwood: I do not see how the subsequent reaction after he has taken his action here—

Mr. Withrow: This is between the two announcements, Your Honor.

Trial Examiner Norwood: I am going to sustain the objection.

Mr. Withrow: Well, I offer to prove that at and subsequent to the issuance by the Federal Portland Cement Company of its February 23, 1935, announcement, being Respondents' Exhibit 2131-A and B, dealer-customers of this witness talked to this witness about that policy, and expressed concern and complaint that they were losing work, that which the dealers normally did, because the work was then being carried on by relief agencies of the Federal Government; that the dealers said they thought they were entitled to handle such work, and as a result of this, these complaints by dealers, and the announcement by a competitor of a sales policy which turned over this class of business to the dealer, this company issued its announcement on April 10, 1935, being Respondents' Exhibit 2135-A and B.

Trial Examiner Norwood: Proceed.

30701 By Mr. Withrow:

Q. Now, would you tell me, Mr. Bates, just briefly whether or not in this instance, also before this April 10th announcement, your salesmen had telephoned you and sent in copies of the announcement of your competitors?

A. Yes, they had, and there again I picked up the announcement of this particular dealer friend of mine.

Q. Now, Mr. Bates, will you tell me whether you had any agreement with any of your competitors to adopt this policy of April 10, 1935?

A. No, sir; none whatsoever.

Q. Did you have any agreement with any dealers
30702 or dealers' associations to adopt this policy of April 10, 1935?

A. No.

The witness identified Resp. Ex. 2136 as having come to his attention, received in the regular course of business from one of their men.

Q. And under what circumstances?

A. Well, our representative called on dealers down in the Fredonia-Dunkirk area, and was informed that various dealers in Stock County were going to boycott Federal Portland Cement Company for selling C.W.A. job direct in their particular town or in the town of Dunkirk.

Q. Did they ever boycott you?

A. I do not think anything ever—I do not recall whether they did or not. I do not believe they did, because we are selling in those towns to this day, and we never ceased selling in those towns.

Q. How do you sell W.P.A. business now, Mr. Bates?

A. Through a dealer.

30703 Q. And why do you sell it through a dealer?

30704 A. Well, W. P. A. business is normally dealer business, that is sidewalk work and curbs, and driveways, and swimming pools, and God knows what that they build in these towns and communities. If W.P.A. was not the buying medium in this particular instance, there would be some contractor and the dealer would get that business just the same. It is normally his, and I think he is entitled to it.

By Mr. Withrow:

Q. Well, do you sell it through a dealer as a
30705 result of any conspiracy with any cement manufacturers?

A. No, absolutely not.

Q. Do you sell it through dealers as a result of any agreement with dealers or dealer associations?

A. No, sir.

Q. Now, have any manufacturers in your territory sold W.P.A. direct?

A. Yes, there have been occasions. They bid it direct.

Trial Examiner Norwood: Since those policies went into effect?

The Witness: Well, since our policy went into effect they have.

Trial Examiner Norwood: Do you know who they were?

The Witness: Yes, I can recall a couple companies that bid direct. I remember them very distinctly.

By Mr. Withrow:

Q. Would you just tell us which ones you remember now?

A. Yes. The Keystone Cement Company bid a W.P.A. proposal direct in the City of Schenectady, N. Y., and the Glens Falls Portland Cement Company bid a direct bid in, I think it was, Akron, N. Y. It was very close to Buffalo, and that is how I paid so much attention to it.

30706 Q. What are your discount terms, Mr. Bates?

A. Ten cents a barrel; 15 days.

Q. And when did the Federal first start to use such terms?

A. Well, since we started in business marketing Federal cement.

Q. And how did you come to adopt these terms?

A. Well, that is the terms our competitors were granting.

Q. Do you make any exceptions to these terms in the event of shipments which run over a long period of time?

A. Well, we have a set of monthly discount terms for volume sales to a customer.

Q. Do you know when those payments are due?

A. Yes, shipments from the first to the fifteenth are payable on the 22d and the sixteenth to the end payable on the 7th of the following month.

Q. Now, you said when you went in business in August of 1933 that you met your competitors' terms. Why did you meet your competitors' terms of discount?

A. Well, our terms certainly had to be as favorable as any of our competitors.

Q. Now, do you ever have any requests from dealers to receive the cash discount even though the 15-day limit is passed?

A. Yes, quite often.

30707 Q. Do you normally allow them to take the discount at that time?

A. No, sir; that is not our terms.

Q. And why not?

A. It is not our terms; our terms of sale are 15 days cash discount.

Trial Examiner Norwood: Now, why do you want to go into that?

What do you want to show by that? Whether or not they allowed deviations from his discount terms?

Mr. Withrow: Well, I just want to show—

Trial Examiner Norwood (interposing): Why did you bring that out?

Mr. Withrow: Well, it is the last question of a series on discounts, and I wanted to show how this company carries on its business, how it enforces its terms, and just exactly what it does do.

Trial Examiner Norwood: How is that relevant to the issues in any of these issues?

Mr. Withrow: Well, he does it independently, Your Honor.

Trial Examiner Norwood: Yes.

Mr. Withrow: And I think all of this is evidence of independent action, the activities of a business man,

30708 carrying on his business in a proper, sound, economic and business-like manner.

Trial Examiner Norwood: Do you think that shows anything whatsoever—

Mr. Withrow: And all of this tends to show—

Trial Examiner Norwood: Do you think that clearly shows anything whatsoever?

Mr. Withrow: All of this tends to show that this is the individual action of this company.

Trial Examiner Norwood: Well, just how? How? May I discover a tendency in those last two questions you have asked—any tendency—or a basis for the slightest inference that there is or there is not any restraint of trade here, or any agreements, or any—

Mr. Withrow (interposing): Well, Your Honor, they have alleged in the complaint that every minute detail of this man's business is carried on pursuant to a combination or conspiracy.

Trial Examiner Norwood: I do not think there is any such allegation.

Mr. Withrow: There happens to be a specific allegation on terms of discount, but there is also a catch-all clause which is used by Mr. Wooden, and other Counsel, to dump in, in carload lots material not relevant to the complaint.

They have put in issue the business activities of
30709 this company, and every other company, which they are charging are co-conspirators, and it is our duty and our right as counsel, we contend, to show why they carry on their business in the way in which they carry it on, because it shows it is done individually and not as the result of any agreement or conspiracy as alleged, or as—

Trial Examiner Norwood: Yes, I am asking you now—you are getting the question into a bag—I am asking you how it shows that, the fact—how could it help your case in any way to show that he allows no deviation from his discount rule?

Mr. Withrow: If it is his own independent policy, Your Honor.

Trial Examiner Norwood: Well, hasn't he a great many independent policies that are not involved in this case?

Mr. Withrow: Well, Your Honor, when the Commission was putting in its case we tried to limit the proposition by our objection—

Trial Examiner Norwood: I am going to ask Counsel to think that over and to please—inasmuch as he has his questions written, it is very easy for him to go over them and mark out those irrelevant questions, bring out those unnecessary details.

We are taking too much time here.

Go ahead.

30710 By Mr. Withrow:

Q. Do you prepay freight, Mr. Bates?

A. Yes, we do.

Q. How long have you been doing that?

A. Since our announcement to the trade under date of January 4, 1940.

Q. What did you do prior to that time?

A. Well, we shipped some shipments freight prepaid, United States Government is an example of that, they insist on that, regardless of where the cement went. We prepay the freight to closed stations in our territory; but the majority of our shipments are made freight collect.

Q. Well, on shipments that you make by truck, is that prepaid?

A. Yes, that's prepaid, our truck shipments are.

Q. Now, when you used to prepay the freight, would you tell us whether the dealer pays his freight for his own account, or whether he pays it for your account?

A. He pays it for our account.

Trial Examiner Norwood: Is the bill made out in his name?

The Witness: Oh, yes.

Trial Examiner Norwood: Yes.

By Mr. Withrow:

Q. Now, you testified that you changed your 30711 policy in January of 1940.

Would you tell me why you changed your policy?

A. Yes, I changed that policy to meet competition.

Q. How did you find out about this competition?

Trial Examiner Norwood: In 1940?

Mr. Withrow: Yes.

Well, Your Honor, the only reason for going into this is, the other day on cross-examination the Counsel for the Commission went into this matter in considerable detail; otherwise, I wouldn't even mention it.

Trial Examiner Norwood: With this witness?

Mr. Withrow: No, another witness.

Mr. MacIntyre: It so happens that it was gone into on cross-examination after Mr. Withrow had already developed in an examination of his of the same witness, that they had in January, 1940. We cleared it up.

Trial Examiner Norwood: I want to strike the last answer on my own motion, and ask Counsel to—

Mr. Withrow (interposing): Your Honor, I want to make a statement in reply to what Mr. MacIntyre said. I cannot even understand what he means.

It was certainly not developed with any witness—the witness he refers to was a witness concerning whom I had nothing whatsoever to do.

Trial Examiner Norwood: Counsel will please proceed.

30712 Mr. MacIntyre: The record is clear.

Trial Examiner Norwood: I do not object to your putting in the descriptive detail there, where it is of any possible use, and I have permitted you to put in a great deal there as, we termed it, to complete the picture. But the matter is getting serious now. Now, I am going to have a five-minute recess here,—a little longer,—and ask Counsel to go over the remainder of his questions there, and see if he cannot shorten it.

Mr. Withrow: Before we recess, Your Honor, I want to say that I have gone over these questions several times, and I did eliminate a great deal of the examination this morning, but I think that I should not be coerced into not asking questions which I feel it is my duty to ask, in order to present the case on behalf of this individual Respondent. He is charged here with having been a co-conspirator, in business,—responsible for some 30,000 documents that the Commission put in. Actually, legally, we would have a right to take every single one of the Commission's documents and call it to this witness' attention and ask him what he knows about it, and how he was connected with it, and so forth. Now, we have not done that. We were legally entitled to do it, and we are doing our best to save time here, and under very difficult circumstances,

30713 when this case was presented by Counsel for the Commission by dumping in, as I said this morning, 8,000 documents on one single day.

Trial Examiner Norwood: I appreciate Counsel's efforts, and I would appreciate it still more if you would put forward further efforts.

By Mr. Withrow:

Q. Mr. Bates, would you tell us whether or not there have been any instances where there has been any damage to cement in transit from your mill to the customer?

A. Yes, there has; there have been several cases of that sort.

Q. Well, take, for example, in the case of damage to a truck shipment, who stands the loss,—do you, does the trucker, or does the dealer?

A. Well, we do, as a general thing.

Q. Do you recall, Mr. Bates, when your company became affiliated or a member in The Cement Institute?

A. Yes, it was December—I can't think of the exact date—but it was in the early part of December, 1933.

Q. Are you familiar with the circumstances under which you joined The Cement Institute?

A. Yes, I am.

30714 Q. What are they?

A. Well, at that time, the N. R. A. and the Code for the cement industry had just been approved by the President. I think that date was November 27th. And we joined the Institute, as I said, under date of December 8th of that same year.

That was one of our purposes in joining the Institute, was on account of the Code.

Another reason that we had in mind was that prior to our going into the marketing end of cement, we had no contact whatsoever with other members of our industry. We didn't know who they were. That contact had always been made by Mr. Schmutz, and we believed that—and we still do—that we would like to know who our competitors are.

That was another purpose for joining The Cement Institute, and—

Q. Go ahead.

A. (No further response by witness.)

Q. Why did not the Federal Company take out a membership in the Institute in August when it began to market its own cement?

A. Well, we were just—humph—you might say, getting started at that time. We had been considering it, the advisability of joining The Cement Institute, but the Code was really the primary reason of our going into the matter.

Q. Now, what services have you gotten from the

30715 Institute which were of any special value to you?

A. Well, we receive Cement Institute freight rate books which we consider very valuable to us, and we get statistical information from them. We also receive any other information that would be of interest to us as a cement manufacturer.

Q. Would you tell us whether or not you consider the Institute to be a dictator of industry policy?

A. Certainly it is anything but that.

Q. Would you tell us whether or not you consider it to be a formulator of company policies?

A. No, sir; positively not.

Q. Would you tell us whether or not The Cement Insti-

tute has ever dictated the pricing method or marketing policy followed by the Federal Company?

A. It has nothing to do with that at all.

Q. Have you ever been an officer or trustee of the Institute?

A. No, sir.

Q. Have you ever been on an Institute committee?

A. No, we have not.

Q. Has any other officer of the Federal Company held any position in the Institute, to your knowledge?

A. No, sir.

Q. Have you ever attended any Institute meetings?

A. Yes, I have attended some.

30716 Q. When were they?

A. Well, they were during the Code period. It has been so long since I attended any Institute meeting, I cannot tell you the last time I was there.

Q. Would you tell me whether or not at any of these meetings you recall any agreement, or even any discussion of specific prices, or sales policies?

A. No, sir.

Q. Now, have you attended any district meetings of The Cement Institute?

A. Yes, occasionally, I did.

Q. What district—Bureau of Mines district—were you in?

A. We are in districts 1 and 2.

Q. What took place at those meetings?

A. Well, about the outstanding thing in my mind at those meetings was just the election of district trustees. That's about all I can recall; I think that's the only meetings we attended.

30724 By Mr. Withrow:

Q. Mr. Bates, did you ever report contracts to The Cement Institute?

A. Yes, sir.

Q. Do you remember during what period?

A. During the period of the Code and following a period—I do not know how long a time after, until it was discontinued; until The Cement Institute discontinued that part of the service.

Q. Do you recall whether that was in December of 1935?

A. It could have been around that time. It probably

was. I do not recall the date. I know I objected to it very strenuously.

30725 Q. Well, did you consider this service to be of any value?

A. I certainly did, for a small company such as we are it saved us no end of time in learning and following contractors and learning what had happened to that particular order.

Q. Now, Mr. Bates, I show you Respondents' Exhibit 2139-A and B, for identification, and ask you if you received that.

A. Yes, I did. There are my initials on this paper.

Q. And I show you Respondents' Exhibit 2140, and ask you if you prepared that letter.

A. Yes, I did. This is my letter in reply to this letter here.

Q. And what were the circumstances surrounding the preparation of your letter?

A. Well, this is a report that came in from the northeastern division showing a recapitulation of contract balances, and there was a plan at this time to sound out the members of the Institute on the advisability of discontinuing this service, and in my letter in reply to that plan I very definitely said that I would like to see the con-

30726 tinuation of the service of reporting contracts, and showing—

Q. But in spite of that—

A. It was discontinued, yes.

30730 Mr. Withrow: Your Honor, at this time I offer to prove through Respondents' Exhibits 2139-A and B, and 2140, that on October 22, 1935, this witness received from The Cement Institute a document or a letter concerning contract reporting requesting an expression of opinion as to discontinuance of the service, and offer to prove through Respondents' Exhibit 2140 that this witness replied to that request requesting its continuance because of the value of that service to him.

Now, with reference to Respondents' Exhibits 2137 and 2138, I offer to prove through those documents—

Trial Examiner Norwood: Now, those have been received.

Mr. Withrow: No. Those were rejected. I wish they were received.

Trial Examiner Norwood: I see.

30731 Mr. Withrow: If you want to receive them I won't make an offer.

Trial Examiner Norwood: I think you better make your offer.

Mr. Withrow: I offer to show through these documents, Respondents' Exhibits 2137 and 2138, that this witness received—

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Go ahead.

Mr. Withrow: That this witness received from The Cement Institute, on January 19, 1935, a document dated by the Institute January 18, 1935, requesting an expression of opinion concerning the value of freight rate information in the form in which the freight rate information was to be prepared and referring to such other matters as the amount of money being levied to meet the budget of The Cement Institute after 1935; and, further—

Mr. Paulson: Your Honor, I want to point out—

Trial Examiner Norwood: Wait a minute.

Mr. Paulson: I object to his taking up the time.

Trial Examiner Norwood: Let him finish.

Mr. Withrow (Continuing): —through Respondents' Exhibit 2138, that this witness replied approving the
30732 freight rate information and requesting it,—merely a change in the form in which it was made available to the companies.

Trial Examiner Norwood: We will hear from Mr. Paulson.

Mr. Paulson: I think that offer of proof is out of order. The documents, on their face, are relevant and material in this case. We said no proper foundation had been laid for their offer at this time. We said,—and when a document is material and relevant on its face, then an offer of proof does not need to be made, and we need not waste the time of the court.

I also want to point out in that offer of proof just made, and some made heretofore, the offers of proof have been stronger, embraced more territory than the proof would have shown, and I submit to Your Honor whenever Your Honor has any doubt as to what can be proved by those documents I submit that Your Honor should then satisfy his doubts about that by letting the Counsel ask one or two

questions or determine by asking questions himself as to whether or not whatever he has offered to prove could be proven or reasonably could be proved so as to test the good faith of the offer of proof, it being my understanding of the law that if an offer of proof is accepted without a challenge of the good faith to the offer that it is then
30733 considered to have been proven providing the Examiner is overruled by some subsequent tribunal. But I say that the offer of proof in this instance, and other instances here, has been made out of order because the materiality and relevancy appears on the face of the document, and in that case there is no need of an argument.

Trial Examiner Norwood: Now, I think this, that the offer of proof has been too general to be really bona fide offer of proof in a great many cases.

I am very particular about an offer of oral testimony, and if I think that the Counsel is offering or has offered anything that he has a right to show I distinguish between what I am excluding and what he may proceed to show. But when the documents,—and those documents are marked for identification,—I have dismissed many of the offers with the statement that upon examination I find they do not show what the Counsel claims. I think that is sufficient. The court has the documents marked for identification there to make their decision on.

30734 By Mr. Withrow:

Q. Do you recall, Mr. Bates, whether or not there was a movement on foot to dissolve The Cement Institute in 1936?

A. Well, I recall that there was a definite move in the direction of curtailing the activities of The Cement Institute.

30735 Q. Did you attend the meeting of The Cement Institute at which this matter was voted on?

A. No, I did not.

Q. Were you represented by proxy at that meeting?

A. Yes. I think—I am sure we were.

Q. Do you recall by whom you were represented?

A. By our trustee, district trustee.

30737 Q. Did you file prices with the Code Authority, Mr. Bates?

A. Yes, we did.

Q. Now, the first prices you filed with the Code Authority, would you tell us what you filed? Did you file new prices or prices which Federal was then selling cement at?

A. We filed the prices we had on record in our Cardex there in the office.

Q. Did you file prices for trucking cement with the Code Authority?

A. Yes, sir.

Q. I think there is some evidence in the record about refusal by the Code Authority to accept prices, the filing of trucking prices. Did the Code Authority accept your filing of truck prices?

A. Well, it runs in my mind that they did not ac-
30738 cept our first filings.

The witness identified Resp. Ex. 2142 A-B as a letter received from the Code Authority calling Federal's attention to the indefinite filings that it had made. It came to the attention of the witness and bears his initial
30739 in his handwriting.

Q. I show you Respondents' Exhibit 2143 and ask you if that is your reply to that letter, or reply of the Federal Company?

A. Yes, that is the reply of the Federal Company to the Code Authority when we did file definite filings, minimum quantities, and answered the question whether a loaded trailer is left on the job, and whether delivery is made f.o.b. the job or f.o.b. dealer's warehouse, and that is the form in which they wanted our filings, what we did.

30750

Washington, D. C.,
January 18, 1940.

30753 (RESP. EXS. 2139-A, 2139-B, 2142-A, 2142-B, and 2143 were offered and received in evidence.)

J. E. BATES thereupon resumed the stand and testified further as follows:

Direct Examination By Mr. Withrow (Continued).

30760 Q. Mr. Bates, I believe you testified that you subscribed to the freight rate service of The Cement Institute.

Would you tell us, briefly, why you subscribed?

A. Well, the freight rate books we considered quite a convenience.

Q. Do you have a file of tariffs in your office?

A. Yes, we do; our traffic man has them.

Q. And what is the function of the traffic man in your company?

A. Well, he checks the tariffs against the rates in the freight rate books to see that they are correct; he has several other duties such as tracing cars, and checking incoming materials to the plant.

Q. Well, has he, in checking the Institute freight rate books, ever found any errors in the Institute books?

30761 A. Yes, I think that there have been some errors that he has discovered in those books.

By Mr. Withrow:

Q. Well, what is done in cases where errors are found?

A. We have always used the correct rate that's published in the tariff.

Q. Do you have any agreement with any of your competitors to use the Institute freight rate book regardless of whether it is right or wrong?

A. No, sir.

Q. Will you tell us whether or not you used the freight rate books in preparing the bills-of-lading?

A. Yes, I think that our shipping clerk does use that.

Q. Do you come into competition with imported cement?

A. No, sir; we do not.

Q. Have you ever entered into any agreement to restrict the importation of cement?

30762 A. No, sir.

Q. Have you ever made any especially low prices for the purposes of keeping out imported cement?

A. No, sir; we have not.

Q. I believe, in the course of your examination, Mr. Bates, you testified that you were free to change the price if you wanted to, and, also, at another place, that the price was too low.

Why don't you raise the price?

A. Well; we just simply cannot raise the price; we have—

Trial Examiner Norwood (interposing): I think you can make a very short answer to that question.

The Witness: Well, we can't, due to our competitors.

By Mr. Withrow:

Q. You mean your competitors selling at a lower level?

A. That's right.

30763 Q. Now, on record page 30522, Mr. Bates, in the first question on that page, I asked you:

"Q. Have you ever discussed the amount of the sales quota with any of your competitors?"

I believe that the answer is erroneous. Would you tell me what your answer was to that question?

A. No, sir; we never have.

Q. The answer was "Yes, sir." Is that wrong, then?

A. That is absolutely wrong.

30764 *Cross-Examination by Mr. Paulson.*

Q. Mr. Bates, do you have to have Cement Institute books in order to meet competition?

A. No, sir. We can take the freight rates from the tariff, but it certainly is a very convenient manner in which we have the freight rates available.

Q. When did you say it was that you confined 30765 your sales exclusively to New York State?

A. At the time Federal—do you mean our Federal Portland Cement Company?

Q. Yes.

A. Yes. Federal Portland Cement Company, when they started marketing cement in 1933— Did you ask exclusively in New York State?

Q. Yes.

The Witness: Could I have that question again, please? I am a little mixed up.

Trial Examiner Norwood: Read it.

(Question read.)

A. We never confined the sales of the Federal Portland Cement Company to New York State.

By Mr. Paulson:

Q. I have a note here that you stayed in New York State, and you were discussing selling territory. You say you never had?

A. Now, you are not talking about Federal Portland Cement Company as a marketing company. I think in my testimony we asked about the Bessemer Cement Corporation's Buffalo plant, which was the Federal Portland Cement Company, and then known as the operating company, and at that time they did stay in New York State as far as their sales efforts were concerned.

Q. Why was that?

30766 A. Well, I do not know as I can elaborate on my previous testimony. It was due to certain specifications on cement. The New York State tested cement, of which there were two different kinds, and Pennsylvania State tested cement. We did not cross— In the first place, we did not have the silo capacity to carry all of these cements.

Q. What do your annual shipments of cement amount to?

A. Well, we have been in business now since—well, 1934, you might say, was our first full year, and we have yet to ship a half a million barrels of cement out of that plant.

Q. How much did you ship last year, 1939?

A. I can almost tell you that figure exactly, 388,000, some odd hundred, barrels.

Q. Do you know how much cement is consumed in the Buffalo market?

A. I cannot tell you exactly how much is consumed there. I think we get our share of what is consumed in the Buffalo market.

Q. About how much is consumed?

A. Oh, I would say upwards of half a million barrels.

Q. Do you know the capacity of the Great Lakes—what the shipments of the Great Lakes Company amounted to last year?

A. No, sir; I do not.

Q. Is it about the same sized mill as yours?

30767 A. Well, I happen to know that the—well, no, making a short answer, it is a bigger mill than ours.

Q. Where is your nearest competitor outside of Buffalo? Where is that mill located?

A. Well, I have never measured that in miles, Mr. Paulson, but I would say that Painesville is probably a little nearer than either Portland Point or Janesville, N. Y.

Q. How much is the freight between Painesville and Buffalo, do you know?

A. I do not know.

Q. About.

A. I haven't any idea. There is no use of my telling you a figure that I do not know. I could get that information for you.

Q. Well, Painesville N. Y., is the other?

A. No. Painesville, Ohio. See, that is west of Cleveland—I mean, it is west of Erie, Pa., and east of Cleveland; between Cleveland and Erie, Pa., is Painesville.

Q. You do not know what freight advantage you would have over your nearest competitor, then?

A. No, that does not stick in my mind.

Q. What variation is there in the switching charges in Buffalo between— Well; can you answer that question, or is that too broad?

A. I think that is too broad, Mr. Paulson. I cannot tell you. As I testified yesterday, our switching
30768 charges are more than either of the other plants.

Q. Well, I suppose they are less to some points, aren't they?

A. Yes, on the South Buffalo Railroad Company; I testified it is the connecting line from our plant, it is, but there is no business on that line.

Q. Well, I do not understand, when the switching charges for a city vary, I do not understand just exactly how you find the price that your competitors are quoting. Can you explain?

A. Well, that is easily explained. We are certainly competing with them each day, and we know when we go in to talk to a contractor or a dealer he will throw the price on the table to us, he will tell us what it is. If our price is high he will certainly tell us it is high, and we will pick up those quotations, that is how we get all of our prices.

Q. Well, are they definitely tied to a base price, a base figure,—they are all in Buffalo, all of the prices in Buffalo, that is?

A. Yes, there is a minimum freight haul in Buffalo; the freight rate in Buffalo is now 23 cents a barrel.

Q. What do you mean, minimum freight rate, from where?

A. Well, that is how the price is made up, 23 cents for freight and your package and your Buffalo base.

Q. Yes, but where does that 23-cent figure come from? You say—is that the minimum established by the railroad?

30769 A. That is your minimum line haul; 5 cents a hundredweight, I believe, is the exact amount.

Q. Does the minimum line haul, within a city like that, apply?

A. It certainly does. It applies definitely to one particular point I have in mind, that is to Lackawanna, N. Y.

Q. Where does the switching charge come into the picture there?

A. Well, of course, in getting cement out of our plant, we switch from one line to the other. We might start out on the South Buffalo and give it to the Pennsylvania and delivery will be made by the New York Central. Just what the railroad term is for switching, why, I cannot tell you. I am not a traffic man.

Q. I think I am getting to see some light in it now. You build up your quotations on the minimum line haul but your actual freight is a switching charge; is that right?

A. Yes, our price is made up on minimum line haul.

Q. Minimum line haul is, in fact, the actual freight that you pay, or that the customer pays?

A. Well, no, he would pay the combination, whatever the switching charges are—we would.

Q. In other words, you build up your price in Buffalo on a selected figure, the minimum line-haul rate
30770 which in most instances, at least, is not the actual freight, that is taxed to the shipment; is that right?

A. Well, yes, our price is based on the minimum line haul of freight.

Q. Since when did you base your price on a minimum line haul of freight?

A. Well, that is always.

Q. Well, that is since there was a base in Buffalo, that is when you started that; is it?

A. Yes, that is right.

Q. Do you recall when the base came in to Buffalo?

A. Well, it was there before we started in business.

Q. Well, did you sell cement in Buffalo when you were with the Bessemer—what was it, the Bessemer Cement?

A. Bessemer Cement Corporation.

Q. Bessemer Cement Corporation?

A. Yes.

Q. And how were the prices made in Buffalo then?

A. Just the same, on minimum line haul; just the same as it is today. At that time we did not have these emergency charges on, I think; I recall that the minimum line

haul freight at that time was around 19 cents, and it has been stepped up by these various emergency charges until it is now 23 cents.

Q. Do you recall when the minimum line haul rate was first used for quoting prices?

30771 A. Mr. Paulson, it was used ever since the time that I first went to Buffalo, in the Buffalo area.

Q. Do you know where the minimum line haul freight that applies in Buffalo appears in the tariff?

A. Well, now, I cannot answer that question.

Q. Does it appear in The Cement Institute freight rate book?

A. I think it does. I think it shows a rate of 5 cents a hundred there.

Q. You think it shows what?

A. I think it shows a rate of 5 cents a hundred there in the freight rate book.

Q. Does it show the extent of the application of the minimum line haul rate?

A. Well—

Mr. Withrow: Your Honor, I object to what the Institute rate book shows. The Institute rate books are already in evidence, and they are the best evidence of what they show. This is improper examination.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Well, he has described on the direct his use of the Institute freight rate books, and I think that goes to—

Mr. Withrow: Well, he is not asking him how he used it, Your Honor. He is asking if certain figures are

30772 in there, certain descriptions in there. Now, the rate books are in evidence, and they show what they show, and anything this witness would say would not change what the rate book shows.

Trial Examiner Norwood: Now, he can find out what the witness knows about it, and how he uses it.

Mr. Withrow: Well, bring the rate book here and ask him how he uses it, and ask him what it shows, and it does not show, but to make this witness sit here and guess what is contained in the Institute rate book is not proper.

Trial Examiner Norwood: Well, he may tell us, if he knows.

Mr. Withrow: It is not the best evidence. We object on that ground.

Trial Examiner Norwood: I think this is proper cross-examination.

The objection is overruled.

By Mr. Paulson:

Q. What I am trying to find out, Mr. Bates, is how do you, as a sales director know where the circumference is, where—bounding the territory in which the mini-
30773 mum line haul rate is applicable?

A. Well, that is determined probably in two ways. We ascertain what the market price is and wherever that minimum line-haul rate would prevail, why, we would find a certain price. If we go beyond that territory we would find an additional price or higher price.

Does that answer your question?

Q. We have had a good deal of testimony in this case already to the effect that manufacturers apply—cement manufacturers apply—the minimum line-haul rate in the city instead of using the actual switching charges, but I have never been able to ascertain from anyone just how they know where the minimum line-haul rate ends and the regular rate begins.

I want to know from you if you can tell me.

A. Well, I think in explaining that situation in Buffalo we use that minimum line-haul rate so that we can quote exactly the same price to each one of our dealers in that particular town.

Q. Well, it more or less works itself out, then. In other words, you may be applying that minimum line-haul rate past the point to which it would apply under the Interstate Commerce tariff, and in other instances you may not be applying it to a point where it does apply under the Interstate Commerce tariff?

Mr. Withrow: Your Honor, I cannot understand
30774 that question. I do not see how the witness can.

Trial Examiner Norwood: I think it is perfectly clear.

Mr. Withrow: I would like to have it read again. It is not clear to me.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Answer that.

A. Well, I think that, first, there are two questions involved there. You say, we do apply it past the point? Well, we do not.

By Mr. Paulson:

Q. And how about the other half of it?

A. On the other side, I would say it would be possible; I do not know just what the various switching charges would figure out to, but it is possible there are some. Here is our situation—

Q. I do not know as you understood the last point.

Mr. Withrow: Let the witness finish the answer.

Trial Examiner Norwood: It would depend on where your customers are.

The Witness: That is exactly right, Your Honor, and in a metropolitan section like Buffalo we have probably 15 dealers who would be located at 15 different points as far as switching rates are concerned. Now, each one
30775 of those dealers is selling our cement. They are all trying to compete against another dealer and we are trying to put them all in the same competitive situation.

By Mr. Paulson:

Q. It would be more difficult to meet competition if you applied the switching charge, wouldn't it?

A. Well, I do not see as how it would be. It would be more difficult for some of our dealers to meet competition, I would put it that way. You see, what we are attempting to do, Mr. Paulson, all we want is to treat every one of our customers alike. We cannot sell one fellow a bag of peanuts for 2 cents and sell another fellow a bag of peanuts for 3 cents, because he is living on the other side of the street; if we are selling peanuts and he is re-selling to somebody else.

Q. Do you follow that process of equalizing conditions for dealers in other territories besides the Buffalo area?

A. Yes, sir; we sell all dealers in any town that we sell cement in at the same price.

Q. Well, they all have the same freight rates, don't they?

A. Well, yes, they have.

Q. But the dealers in Buffalo have different freight rates from your mill?

A. Well, I don't know how; Mr. Paulson, I can explain any more that I have.

Q. It is perfectly clear to me. I am merely ask-
30776 ing you whether you apply the policy which you say you adopt in Buffalo; namely, of applying a uniform freight rate from your mill to all dealers in Buffalo, and

you say you do that in order to equalize competitive conditions on both of the dealers. I am asking you if, to any other part of your sales territory, you apply that sales policy.

Trial Examiner Norwood: As to localities.

A. Well, there is no other territory that we are in contact with switching charges.

By Mr. Paulson:

Q. Well, on a branch line out of a division point somewhere near Buffalo, there are several towns six miles apart, aren't there?

A. Well, yes, there could be.

Q. And a dealer six miles in one town is in competition with a dealer in the town six miles up the line, isn't he?

A. Well, he could be.

Q. Well, do you give him the same rates—do you sell at the same delivered price at his—

A. Well, that's based entirely on the railroad, whatever the railroad tariffs are to a certain destination.

Q. Well, I say, your policy is not uniform. Your treatment of dealers is not uniform. You treat those in the country on one basis, and you treat those in the city on a different basis.

30777 A. I don't think you could compare dealers that are six miles apart; I don't know of any dealers that would be six miles apart.

Q. Well, in other words, I just wanted to find out how you price—in other words, in all other destinations except in the City of Buffalo, you make up your prices, Buffalo plus freight; is that correct? Buffalo base plus freight?

A. Well, yes, we make our prices to equal prices we find in that field, certainly.

Q. Well, that does not answer my question. Do I state it wrong?

You do not, as I understand it—you cannot agree with me that you do make up your delivered prices at all other points by adding freight to the Buffalo base?

A. Well, not all other points.

Q. Well, at all other points.

A. Just as far as we can, as far as that price is competitive with them.

Q. In other words, you run into some territories which are controlled by some other base?

A. That's exactly right.

Q. Then what do you do?

A. Then we have got to meet that price, if we want to sell cement.

Q. And that price is some other base plus freight?

30778 A. That's quite possible; as a matter of fact, it is true.

Q. And you use the Institute rate books to figure back to find out—to find out the base point controlling the territory; do you or don't you?

A. Well, before we do that we have got to determine just what base price is, due to the procedure I described a day or two ago, of picking up prices, and then following them back to a—to a—

Q. But, in the prices, you follow them back, you use the Institute freight rate books, do you not?

A. We do.

Q. You said on direct that you lost out in Oswego, because of the Huron competition; is that correct?

A. Well, I think I stated in my testimony, Mr. Paulson, that we were practically eliminated from that market due to the services, the trucking services that were offered.

Q. The services then are readily translated into price, are they not?

A. Oh, not necessarily, no. Price is—

Q. What is the difference?

A. We could— Sure, we could ship up there and meet the price of the Huron Portland Cement Company; but we cannot meet that service that they are offering to the customers there.

30780 Q. What was your average mill net in 1939?

A. I think around $1.52.

30781 Q. Do you think that by reducing that to $1.25, you could have eliminated any of the competition?

A. I don't think so, Mr. Paulson. I don't think the price would have any effect, whatsoever.

Q. Well, Huron's reducing the price in Oswego had the effect of causing you to withdraw?

A. It was not the price. I will meet Huron's price tomorrow if I am on an equitable—in an equitable position to render the service that they are giving up there.

Q. But suppose you added such service, use the same price in Buffalo, but add a service, do you think that you would drive out any of your competition?

A. Well, we still have plenty of competition in Buffalo

from companies that are shipping in there, in spite of our service?

Q. You could drive some out, though, could you not?

A. It is possible that there might be some. We ourselves have voluntarily taken ourselves out of that Oswego market, because we cannot possibly compete with what the Huron people are doing in rendering services to their customers.

Let me give you a little further on that, too: We can compete with Huron, as far as price is concerned, in that Oswego market, but we can only compete to the extent that when we sell a customer there we are selling him 150 or 132 barrels of cement. When Huron sells a customer they are selling a customer on a partial basis, of 60 barrels of
30782 cement, or 50 barrels of cement, and the customers today—there are more customers buying from hand to mouth today in that section than ever before; you cannot sell a man 150 barrels of cement when he—that is, you can at times if there is a job going on—but if he wants it for his normal stock he will take 50 barrels, invariably.

Q. Mr. Bates, when did you inaugurate trucking in the Buffalo area?

A. Well, Mr. Paulson, we didn't inaugurate trucking; trucking was there.

Q. Has it been there ever since the Federal started selling cement?

A. Ever since—yes, absolutely; and I was going to add further, ever since I can remember.

Q. Is it your custom to stay completely out of the New Jersey markets?

A. Yes, indeed, we don't attempt to come there at all.

Q. Do you know what the freight rate is between Buffalo and the New Jersey points in that part of New Jersey which extends up into New York?

A. I am not interested in that market at all, Mr. Paulson, so I have no reason to check those freight rates.

Q. Did you check them when you received the Government invitation to bid on a considerable quantity of cement for New Jersey? Do you recall that?

30783 A. No, sir; I was no more interested in that proposition than I was in the Mississippi proposal.

Q. You never checked them at all?

(Witness makes no response.)

Q. You did not check the rates, I say?

A. Not the rates in New Jersey, no, because I know from experience that we cannot reach that section of the country.

Q. Has it been your experience that you and all of your competitors solicit business on the uniform price basis?

A. Well, no, I wouldn't say that. I don't know what our competitors do, but I know we solicit business.

Q. That does not correspond with your testimony on direct. You said your pricing was entirely guided by what your competitors did.

Now, you say it has nothing to do with it. Which is correct?

A. Well, just let me explain it. I am telling you what we do on that. We will go into any market and meet any competitor's price, or any of his conditions of sale.

Q. Then you do know something about your competitors' prices?

A. Yes, from the information we pick up.

Q. Now, then, let me ask you the question again: Is it your experience that all companies in your territory solicit business on a uniform price basis?

30784 A. Well, I don't believe I can answer that question the way you have asked it there. We have a price that we give a customer, and we are not able to get that business unless it is either equal to or below what our competitors do.

Q. Do you know of any competitor of yours that does not use Buffalo base to establish his prices in the Buffalo area?

A. No, I can't say that I do.

Q. Do you know of any competitor that does not use the base that controls the adjoining territories to establish his price in those territories?

A. I don't know how he establishes his prices.

Q. There isn't—

A. I know how we establish ours.

Q. There isn't any doubt in your mind, is there, that there is a pattern for prices in the selling territory in which you offer your product?

A. Well, that's my purpose in picking up these prices, to determine what the pattern is, Mr. Paulson.

Q. But, I say, there is no doubt in your mind but what there is a pricing pattern there, is there?

A. I can't tell you anything about our competitors. I can tell you what we do. I can tell you how we make up our prices, if you ask me that question.

Q. Are you ever seriously in doubt as to the price that prevails at any destination point in your territory?

30785 A. Well, I think any time you make a price there is a possibility that—

Q. Well, answer the question. Are you ever and were you ever, during 1939, in serious doubt as to the price that applied at any destination point in your sales territory?

A. Oh, I can't say that—I quoted what I assumed to be the going price in that particular market.

Q. These are not catch questions. Will you answer the question: Were you ever seriously in doubt about any one of those prices?

A. No, we quoted a price that we thought would be the price at that market.

30786 Q. A price change in your territory is news, isn't it, Mr. Bates?

A. It is news?

Q. Yes.

A. Well, it is not startling news. As matter of fact, it does not surprise me when you see it coming.

Q. You do not see them coming very often, do you?

A. Quite a few changes in that Buffalo market.

Q. How many in 1939?

30787 A. In 1939, I don't recall any there. We had one or two in 1938.

Q. How many in 1937? I mean, in all the cities.

A. I don't believe there was any in 1937. I think we—

Q. Well, two in three years is almost news,—it makes it news, doesn't it?

A. Well—it is news we don't like to hear.

Q. In other words, the ascertaining of price, the question of price, is really not one over which you would trouble your head much, is it?

A. Well, yes, indeed, we are very much interested in keeping our price in line with competition.

Q. You can't do anything about price, can you?

A. Just how do you mean that question?

Q. You cannot raise the price, can you?

A. Well, as I stated, because our competitors won't permit us to raise the price.

Q. The price in your territory must move at the will of more than one competitor?

A. They have all got to move or there is no price. If one just stays below, why, then, we all go back to the low price.

Q. What were those price changes you referred to in 1938, were they changes in the Buffalo base?

A. Yes, sir.

Q. Both of them?

30788 A. Well, now, let me see, I would say yes. I recall that one very definitely, that one that Huron put in in July some time.

Q. Down or up?

A. Down—that's always the way we price cement.

Q. Both of them down?

A. Yes.

Q. How long since?

A. Except probably an emergency freight rate charge, it may go up a penny or two, but I am talking about, really, the price of cement.

Q. Can you see how the price of cement in your sales territory could ever change without some cooperative action on the part of those selling cement in that territory?

A. Oh, I could change the price in the territory tomorrow morning, if I wanted to.

Q. Why don't you put it up, then?

A. Uh—I wish I could—If I could put it up as easy as I could put it down it would be fine.

Q. My point is, you would never attempt to raise the price there, would you?

A. I would not say that I would never attempt to raise it. I think it would be kind of foolish to attempt to raise the price.

Q. Before you issue quotations you would want 30789 to consult with your competitors, wouldn't you?

A. I certainly would not. If I issued quotations, or a price reduction, I would issue the quotation if I thought I could get by, by increasing the price, I would issue the quotations without consulting them whatsoever.

Q. How would you lay your foundation for your judgment as to whether or not you could get by?

A. If I reduced the price, Mr. Paulson, certainly the customers would see that I got by, if they did not see fit to meet that price.

Q. But as to price raises?

A. I do not know, that would be kind of wishful thinking on your part, if you thought you could send a price up, just because you sent it out, you would think everybody is going to meet that price.

Q. You would have to sort of sense, sample the sentiment among your competitors before you raised the price?

A. No, sir; I will not say that.

Q. You would have to do it or you cannot raise the price?

A. You may do that before you attempt; if I thought it advisable to send a price increase I would be very happy to see my competitors go along with me.

Q. It would be kind of a foolish move to send out a price without sampling the sentiment of your competitors?

30790 A. I do not see that that has anything to do with it. I should be able to determine whether to take a price raise, the same as they are, whether I will decide today to take the price off in Buffalo 10 cents.

Q. Yes, you have that right, you are not bound not to raise the price and not to change it.

A. That is right.

Q. But, I say, the practical working of the thing, it is just foolish for you, as an individual, to attempt to raise the price, isn't it?

A. Just as foolish as what? Do you mean to raise it as to lower it?

Q. To attempt to raise it without knowing that your competitors will go along.

A. Well, of course, I have never attempted to raise the price in Buffalo. I hope that the price in Buffalo goes up. I would like to get more money for my cement than I am getting today. I cannot answer that question. I would say this definitely, regardless of what I might do or what I wanted to do, that would be my independent action regardless of what competitors said.

30792 Q. I know, but the pricing structure in the cement industry in the sales territory in which you

operate is such that it is just impractical for you to attempt to alter it independently isn't that so?

A. Well, I think probably my best answer to that question is, Mr. Paulson, I have been in that territory when there has been a great many changes, both up and down, and I have yet to have any of my competitors ask me how I felt about the price, whether they raise it or whether they lower the price, that price is out in the field, and we find the price, we attempt to meet it. Now, that is—

By Mr. Paulson:

Q. But I am talking to you as more or less a medium or small sized plant.

A. Well, if I wanted to try a price increase, as I say, I could issue my quotations now; whether that would stick or not I have no reason—I could hope for it to stick, but I do not know that it would. If my competitors did not meet that increase in price, I mean we would very soon certainly learn about it because we would not be getting any business from our customers quoting that up price.

30793 Q. Do you know the average mill net for the year 1935?

A. I cannot give you that. I will be glad to send you that.

Q. Well, do you know the low that you received?

A. In 1935?

Q. Yes, or some of the low that you received? What was the range of the lows that you received?

A. In 1935 our price, even our low, would have been considerably higher than it was as I testified in 1938.

Q. Have you an idea what it was?

A. Oh, I do not know. I imagine about around $1.35, $1.36.

Q. Do you think that was the lowest you received?

A. I would imagine so.

Q. How about 1936?

A. I cannot tell you that, Mr. Paulson. As I say, if you want that information, when I get back to Buffalo I will be very glad to send you the low and the high of any year you want to know.

Q. I would like to get those. I thank you for that. I would like to get the lows and the highs and the average for those four years, 1935, 1936, 1937, 1938, and 1939, five

years, but I thought you might be able to give me an idea now.

A. I cannot recall those figures. I see so many figures in the normal course of a day's business that I just cannot retain them, that is all.

Q. What connection, if any, did Mr. Schmutz
30794 have with the Federal Company, Mr. Bates?

A. Do you mean the marketing company?

Q. The Federal Portland Cement Company.

A. Well, he had no official connection with the Federal Portland Cement Company, which was an operating company. He controlled the sales policy of the Bessemer Cement Corporation, and he also had a hand in the operating policy of the corporation.

Q. Of the Federal Portland Cement Company?

A. Well, understand this picture: I presume that Mr. Snyder gave you the picture on that. The Bessemer Cement Corporation had control of sales, and the operating of the Federal Portland Cement Company.

Q. From what time to what time?

A. Well, as I recall, the Bessemer Cement Corporation took Federal under their supervision around about 1927.

Q. And kept it until—

A. Until July of 1933.

Q. Now, after July, 1933, what connection, if any, did Mr. Schmutz have?

A. He had no connection whatsoever.

Q. Didn't he advise you as to the method of selling cement?

A. Do you mean after that time?

Q. Yes.

A. No, sir.

30795 Q. Did you communicate with him in your official capacity as sales director for the Federal Portland?

A. Oh, I might have talked. I know I talked to Charley Schmutz after he left the Federal Portland Cement Company.

Q. Did you consult with him with regard to methods of marketing?

A. No, sir. My talk with Mr. Schmutz was at the time he contemplated changing sales managers of his company, the Bessemer Limestone.

Q. You learned your sales methods from Mr. Schmutz, I presume, while you were in his company working with his company?

A. Yes. I told Mr. MacIntyre that during the recess.

Q. And you conducted your office in the Federal Portland much after the manner in which—that you learned through Mr. Schmutz; is that right?

A. Yes, I would say so, sir. He was my instructor in the cement business, and of course I followed in the line in which he taught me.

Q. Do you know if any part of Mr. Schmutz's compensation came from the Federal Portland Cement Company after 1928?

A. No, sir; I would not know that, Mr. Paulson. I was in no position in 1928 to know that.

Q. Do you know why it is the Federal Portland Cement Company sells exclusively at delivered prices?

A. Yes, because that is where we meet the im-
30796 pact of competition, is at the destination point.

Q. Can you think of any other reason?

A. Well, that is the primary reason.

Q. Well, do you have any other thoughts on the matter, any other secondary reason?

A. Well, I think I testified yesterday that I certainly was opposed to selling at an f.o.b. mill price.

Q. Why?

A. For the simple reason that you would be in all kinds of trouble with your dealers.

Q. Well, you sell a certain amount of your cement direct, why can't you sell that f.o.b. mill?

A. Well, I do not think, Mr. Paulson, that you can have a two-sided policy. You have got to have one policy that all of your customers understand; they are all treated alike, and you cannot sell one f.o.b. mill and say to the other, "We are going to sell you at a destination price." We try to attempt to treat all of our customers alike.

Q. You sell some of your cement direct?

A. Yes, we do.

Q. And the dealers do not share in the business that you sell direct at all?

A. That is right.

Q. Now, then, you are in competition with your dealer.

A. Well, yes.

30797 Q. Well, why don't you sell f.o.b. mill to those customers of yours which you now sell direct?

A. Well, I still think the answer I gave, Mr. Paulson, answers the question, that we cannot have a two-way policy. We have got to treat all of our customers alike. We sell those contractors at the same price under the same terms that we sell a dealer, and as long as we do that we feel that we are doing the right thing and the proper thing.

Trial Examiner Norwood: If you sold them f.o.b. mill you would be underselling your dealer?

The Witness: Well, I would not—

Trial Examiner Norwood: That is, if you sold the contractor f.o.b. mill?

The Witness: It is quite possible that the contractor there could pick up cement and undersell your dealer if he cared to, but that is not our policy. As I say, we have a well-defined policy of how our sales should be made, and I think—

Trial Examiner Norwood: You have answered that.

By Mr. Paulson:

Q. I do not know what you consider a two-sided policy. Let me see if I can get that straight, Mr. Bates.

Don't you consider it to be a two-sided policy when you sell some customers through dealers and others direct?

A. No, I don't think so. Our policy is well de-30798 fined on who we are going to sell, the classes of business that we are—

Q. But you are in competition with your dealers; is that right? You answered that, I believe.

A. Well, you can call it competition, if you want to. It is the business the dealer performs no service on whatsoever, and the dealer does not bother his head about that type of business that we do compete with him and sell at the same terms as that dealer.

Q. Well, the fact of the matter is it would be more—there would be more price fluctuation if you sold f.o.b. mill, isn't that true?

A. It is quite possible. Yes, I can see very definitely what the result would be if we sold at f.o.b. at our mill. That would mean before very long we would start losing customer after customer because some dealers would come in there and pick up cement and take it into another territory where we are retaining the good will of a dealer by working a hundred percent through him, and he would

dump the cement—would have the same brand of cement that our dealer has been trying to build up in that particular town.

Q. Well, I am not so concerned with your not selling dealers f.o.b. mill as I am with that part of your sales which you now sell direct. I cannot understand why you do not sell those f.o.b. mill.

Mr. Withrow: Your Honor, I submit that precise
30799 question has been answered at least six or seven times.

Trial Examiner Norwood: I think he may answer.

The objection is overruled.

By Mr. Paulson:

Q. Can you explain further on that point?

A. No, I cannot. I think I have answered the question to the best of my ability.

Q. Well, the real reason for not selling those people whom you now sell direct f.o.b. mill is that it would cause disturbances price-wise in the market; isn't that true?

A. No, I would not say that that is my primary reason for that, or the important reason for not selling f.o.b. mill. If we decided to sell f.o.b. mill we could sell f.o.b. mill tomorrow morning.

Q. You are interested in price stabilization, are you not?

A. Price stabilization?

Q. Yes.

A. Why, yes. I am interested in seeing us get as much money for cement as we possibly can.

Q. And you would consider it poor business to go out and create price disturbances in the cement market, wouldn't you?

A. Well, personally, if you want my opinion of that, yes. I do not think it would be good business to go out and create distarbances that would pull my price down lower than it is today.

30800 Q. You do everything in your power to avoid causing price disturbances, do you not?

A. I do everything in my power to get as much money for my cement as I possibly can.

Q. And selling exclusively at delivered prices is a step toward price stabilization, is it not?

A. I do not know where you might say, when you are coinpeting for a particular piece of business, and we are

quoting the same price as everybody else quoting at that point; you might call that stabilization of price if you want to; I don't know; price can change any time, any day, any hour.

Q. You can answer that question "yes," can you not?

Mr. Withrow: I submit, Your Honor, that is not a proper question. Ask the question and let the witness answer it.

Trial Examiner Norwood: The objection is overruled.

By Mr. Paulson:

Q. Your answer is "yes" to the question, is it not?

30801 A. I think my answer there is about as clear as I can give it to you, Mr. Paulson.

Trial Examiner Norwood: Can you answer that "yes" or "no"?

The Witness: I cannot.

By Mr. Paulson:

Q. Were you first sales manager for the Federal Portland Cement Company?

A. Yes, sir.

Q. That is, you were put in charge immediately when they started to market their own cement?

A. Yes, that is right.

Q. Did you announce a policy of sale when you began?

A. To the trade?

Q. Yes.

A. No, I do not think we did immediately announce a policy to the trade, no. I continued on with my past experience in the cement business; I carried on the business. I was in the same office, the same company, carried on the business just the same as I had done before.

Q. It is price that you customarily are interested in, isn't it, Mr. Bates?

A. Yes, price and service.

30802 Q. On direct you said that you found that your customers were sort of partial to delivered price—delivered prices. I am trying to find out whether their favoritism for delivered prices was based on a love of the method, or an interest in the price?

A I can answer you now, Mr. Paulson.

I don't believe I can say it is because a customer
30803 has a love for the particular method. It is his desire to get the price, or to know what the price of

cement is going to cost him, where he is going to use that cement to build a piece of concrete work.

Q. In other words—.

A. He doesn't care what the method is.

Q. In other words, if you quoted him an f.o.b. mill price and gave him the information along with that quotation as to the freight rate—in other words, figured out what it would cost him laid down, he would be just as happy, would he not?

A. Well, he would—he would probably get the same answer.

Q. Yes. It wouldn't be a difficult matter for you to quote him an f.o.b. mill price and then calculate it out to his destination point and tell him what it would cost laid down, would it?

A. Well, I can see it would be much more comfortable for him, and us, too, to tell him what the price would be at the point he was going to use the cement, the destination price.

Q. As a matter of fact, you do calculate both figures before you make an offer of sale, don't you?

A. Yes, we determine what the price is going to be at that point.

Q. You have expressed yourself as being very anxious to work in cooperation with the dealers, I believe; is that true?

A. Yes, it is; I am very definitely dealer minded.

30804 Q. Well, what percentage of your business is handled through dealers now?

A. Well, now, there, again, Mr. Paulson, I can't give you any exact figures. I would say about in 1939—I am just taking a shot at this in the dark now—I would say that 85 or 90 percent of our business has gone through building supply dealers.

Q. Have you had any shift in the portion of your business which goes through dealers, during your experience with the Federal Portland Cement Company?

A. No, I think the dealers—the dealers are getting as much business now as they did before.

Q. It is about the same, you say, during the period referred to?

A. I would say so.

Q. Direct sales are not on the increase, do you think?

A. Not in our particular section of the country.

Q. That is what I am asking about.

A. That is, than what they were when we started in business, that's the question you asked me.

Q. Mr. Bates, before you decided to bid, or not to bid, rather, on that Government invitation for cement in New Jersey, Commission's Exhibit 1399, did you have any conversations with anybody in the cement industry?

A. No, sir.

30805 Q. What I am anxious to ascertain is whether or not you were left entirely by yourself in making that decision?

A. Yes, indeed, uh-huh.

Q. You had no—

A. I decide on all proposals that I am going to bid on.

Q. You had no word as to what any of your competitors were going to do?

A. No, sir.

Q. And you did not know what any of the members of the cement industry thought on the matter, such as Ben Affleck?

A. No, sir; I did not.

Q. And you heard no gossip around as to the possibilities of how other companies were going to bid?

A. No, I did not.

Q. On either that bid, which is Commission's Exhibit 1399, or the other invitation that you received,—and Exhibit 1394—would your answers to those same questions be the same?

A. Yes, that's right, Mr. Paulson. I was just as surprised as—

Q. Did you attend any of the meetings of The Cement Institute, or the Portland Cement Association, before you had to make your decision, and after you received those invitations?

A. Well, now, I can't say here whether I attended any meetings of the Portland Cement Association before; I don't recall the date of the bid.

30806 Q. I am talking about the period in between the time you received the invitation and the time that you made up your mind as to what to bid.

A. No, sir.

If I happened to be in attendance at any meetings of the Portland Cement Association, I can assure you, Mr. Paulson, that that bid was not discussed in my presence. I—

Q. Did you attend any meetings of either the Cement Institute or the Portland Cement Association, between the time you received the invitation and the time that you made your decision as to how to bid?

A. I don't believe so, but I might be wrong now. I would have to check that and find out if there was such a meeting scheduled; I cannot even tell you that.

Q. It is your understanding, then, and your testimony, that there wasn't any word passed around as to the response that should be made to those requests for f.o.b. mill bids?

A. The responses that should be made?

Q. Yes.

A. Certainly not, that response—

Q. Or did any word pass amongst the trade, and any word come to your attention, regarding the responses that would be made to those invitations?

A. No, sir; not that—I can say definitely no.—I was just going to tell you about the response that I made,
30807 if you would like to hear it.

Q. Yes.

A. It is in the testimony.

Q. Yes.

A. Or my letter to the Government.

I wasn't going to make any response at all until Mr. Snyder sat down, and I told him how I felt about it, and he said "Well, all right; let us write the Government and tell them," and I thought at that time—as it is today, and at that time, the f.o.b. mill price was a controversial point which our counsel had, and we certainly were not going to quote an f.o.b. mill price to the Government when we had not quoted anybody else.

Q. Well, the invitation was contrary to the philosophy of the industry, so far as you understood it, wasn't it?

A. Well, now, you are talking about the industry; I can't tell you that. It is contrary to our policy.

Q. Yes. In other words, you did not consider the invitation seriously, did you?

A. Oh, yes, I—I at that time, I read the invitation, and when I finally determined what they were after, and what the sale of that particular parcel of cement would mean, I refused to bid.

Q. Did you consult with counsel regarding that invitation?

A. I did not.

30808 Q. Did you have any help from any outside source at all in reaching your decision?

A. The help that I had, Mr. Paulson, I have already told you, Mr. Snyder and I sat down and we discussed that proposal.

Q. Do you know whether or not Mr. Snyder, or any other official of your company, had any consultations or discussions?

A. Well, now, I can't say from memory that he never sat down and discussed that bid, but I—humph—I would almost stake my life on the fact he did not, because he discusses everything regarding the company with me. I am positive he never—that he did not know about the bid until I brought it to his attention.

Q. The Examiner received into evidence a map, Exhibit 2081, which showed a division of New York State, as I recall the map. Do you recall that exhibit, Mr. Bates?

A. Yes, I do.

Q. I just wanted to clear up the point as to whether or not you used that map in any way to make up your mind as to how to answer that bid—that invitation.

A. Well, I would like a pretty picture of the drawings I had on that map. I was particularly interested in seeing where all the zones were, and how much of our territory would be affected, if there was an f.o.b. mill price quoted.

Q. Yes, but, I say, the chronology there is important. Did you use that map to in any way make your deci-

30809 sion, or did you use it afterwards to study the possibilities?

A. Well, it was—I think it came about the same time, Mr. Paulson. We had the proposal, had the map, I drew out the territories to see where the cement was going to be used. I was only interested in that Zone A and Zone B, or 2-A and 2-B.

Q. On voir dire you told me that you made the map after you made your decision. I want to check with you to see whether or not that is correct.

A. As I recall my testimony, I told you I thought it was about the same time, and then you said "after," and I said "Yes, it could well be after."

Q. Is your memory any more complete now?

A. It isn't any more clear now than it was when I testified; it doesn't make any difference to me whether it was before or after.

Q. Have you ever established a price in your sales territory, in your own experience?

A. No, sir.

Q. I believe you testified that Standard Portland Cement Company initiated a price change in northwestern Pennsylvania in early 1936.

Do you happen to know whether Standard consulted, or sounded out your company's attitude before they issued that quotation?

A. I know they didn't sound out our attitude.

30810 Q. That territory in which that price rise occurred is controlled by a base other than Buffalo, is it not?

A. Well, there was—I don't know, I think Buffalo controls part of that territory, yes, Erie, Pa., and I am sure Buffalo controls the Erie, Pa., base.

Q. And would Standard change the Buffalo base price?

A. Well, I probably misquoted there, Mr. Paulson. I say now—

Q. Which base price did they change in early 1936?

A. Well, they changed the Cleveland base.

Mr. Paulson: Do you have Respondents' Exhibit 2084 there, Miss Reporter?

(The Reporter hands Respondents' Exhibit 2084 to Mr. Paulson.)

By Mr. Paulson:

Q. Oh, yes, I want to ask you, Mr. Bates, if you analyzed these quotations which are Exhibit 2084-A to N (handing document to witness), when you received them to determine whether or not they reflected a change in a base price?

A. (Witness examines document, Respondents' Exhibit 2084) Yes, we would.

Q. Did you analyze them, I say, at that time?

A. Yes, that's our standard practice when we get these—

Q. What base was changed by those announcements?

A. This was a change in the Cleveland base.

30811 Q. Do you have any so-called arbitraries in your sales territory?

A. Not to my knowledge; no, sir.

Q. Everything is controlled by base points?

A. Yes, they are controlled by a constant figure that's used in making up your price.

Q. Well, then, the picking up of quotations is not really such an important matter in your sales efforts, is it?

A. Yes, this is—this is one of the most effective methods we have.

Q. The only thing you have ever learned in all of your experience in picking up those quotations is that a base price has been changed somewhere, isn't it?

A. Well, no: What we learn when we pick up these quotations, is that the destination price has been changed, and we check back to find out how the change came about, what pattern was used.

Q. Yes, and in all of your experience have you ever found that any other change in your pattern occurred than a change in a base price somewhere?

A. Well, change in freight rates.

Q. Well, yes, or change in freight rates.

A. That's right.

Q. But they are added to the—

A. And change in trucking.

30812 Q. But the change in freight rate is uniform throughout and also controlled by a base point?

A. Well, yes. You asked me about the changes, and I told you we—

Q. I mean, you don't have occasion to send your salesmen around to keep their ears to the ground with regard to every destination point from day to day, do you?

A. That's one of the duties of our men in their particular territory to keep their ears to the ground and find out anything that our competitors are doing at all times, and to keep us informed up to the minute.

Q. But you could summarize very easily what they have discovered in your experience with the Federal Portland, couldn't you?

A. (No answer.)

Q. From the changes that they have discovered, and the experience that you have had, you could summarize very briefly, could you not?

A. Well—

Q. Just what have they discovered in your experience with Federal Portland?

A. Well, they have discovered changes in the price at destination; they have discovered change in the method in which we are handling freight.

Q. What changes did they discover in the method
30813 of handling freight?

A. Prepaying freight now instead of—

Q. Oh. But, in 1933, your salesmen—did your salesmen report any changes in your sales territory?

A. 1933? Yes.

Q. Which one? What change?

A. Well, not after we started manufacturing cement; I am getting—

Q. When was the first time they reported a change after you started manufacturing, in any part of your sales territory?

A. Well, there would be changes, not concerning price; there would be changes—

Q. In dealers' methods?

A. —in maybe trucking or any others.

Q. Any changes in prices in 1935, or 1934? Did they report any changes in price?

A. Not that I recall.

Q. In 1936? In 1937?

A. Yes, in 1937 I think we had some changes.

Q. Well, they reported no more than five changes of price in your whole sales territory?

A. I don't know how many they have reported; whatever they reported, Mr. Paulson, we have a record of it in our office.

Q. Well, it is not consequential, it is very small?

A. It doesn't happen every day.

30814 Q. They reported how many changes in dealer policies, in your sales territory, in the time you have been with the Federal Portland?

A. Well, they reported a very definite change, I think it was in 1935.

Q. Well, let us look at the history of that dealer policy proposition.

A. There has been no change in our dealer policy to speak of; that is, generally, we are performing under the same idea of dealer policy that we were when we started, we are today, with the exception—

Q. You started in 1933, and you used the dealer policy that your competitors were using; is that correct?

A. We had used the dealer policy that I had always used in—that's the policy we used.

Q. Did you find any competitor using any different policy?

A. It is quite possible we did.

Q. In minor details or major details?

A. Oh, I would say, probably we might have thought they were major; the company that used them might have thought they were minor.

Q. And then the Code came along, and you all had the same dealer policy under the Code, until Article XI was stricken?

A. That's right; that was mandatory.

Q. Then when the Code, Article XI, was stricken,
30815 none, you or your competitors, had an identical dealer policy, as far as you know?

A. We still, Mr. Paulson—our company, and that's all I am speaking for—we still maintain a strict dealer's policy the same as we maintained before.

Q. Wasn't there some confusion as to dealer policies between you and your competitors after the Article XI was stricken?

A. Well, there was no confusion as far as we were concerned.

Q. That is to say, your policy you adopted—you went back to the policy you had before the article; is that right?

A. Yes, which was practically the same as our Article XI.

Q. Did you find that your competitors all went back to the policies they had?

A. No, I would say some of our competitors, they didn't probably put the same emphasis on a dealer policy that we did, they made sales and quotations and took business.

Q. There was some switching of dealers between companies due to variation of policies after Article XI was stricken; is that right?

A. Well, I don't know of any change in our particular company.

Q. Did you lose any dealers as the result of variation in policies between your company and your competitors after Article XI was stricken?

A. I don't recall any dealers that we lost. As I
30816 say, we still maintain a very firm dealer policy.

Q. Well, now, then, you announced your policy

in February of 1935 after you found the policy of your competitors?

A. That's right.

Q. Did that announcement change the policy that you say you had gone back to after Article XI was stricken?

A. Yes, there was some business in there.

Q. Will you tell us, very briefly, what the change was?

A. Yes, it permitted direct sales to block manufacturers,—that policy.

Q. Any other important change?

A. In that original policy, I don't believe so. It sold, I think—Well, I would have to have the policy to refresh my memory.

Q. With the announcement of the February policy by you, and your competitors, you were all on an identical basis, so far as your treatment of dealers was concerned?

A. Well, we were, as far as our competitors were concerned; yes, sir.

Q. Then you changed your policy again in April, 1935?

A. Yes, a restatement.

Q. Do you know of any competitors of yours who did not change in accordance with the change that you made?

A. No, I don't, I can't say that I did. I do know that
30817 our most important competitor issued that restatement of policy, and we were very quick to give the dealers that same policy.

Q. What correction, or change in policy, was made by the April announcement, as against the February announcement?

A. Well, as I recall it, it made some concessions to dealers. You take some of the companies were quoting and selling these federal relief agencies on a direct basis, and when that policy came out, why, it was a distinct concession to the dealers that they would handle the federal relief agency business, regardless of location.

Q. About the time that you issued that April announcement, did you receive a mimeographed form headed "Division of Sales" or "Methods of Marketing Cement" in the course of your business?

A. Not that I recall; no, sir.

Q. Did you ever see a mimeographed form dealing with distribution of sales during the period there between February 20 and April 10, 1935?

A. Yes, I saw our own. We sent out instructions to our salesman how we were going to handle certain types of business.

Q. Did you send it out in several-page mimeographed form?

A. No, I don't think it covered that much territory.

Q. Did you ever see a little collection of mimeographed sheets showing division of sales in that period?

A. No, if I did I do not recall it.

30818 Q. Well, aren't there some nice points to be determined under these broad announcements of policy that you made on the 20th and on the 10th, I believe, of April, 1935?

A. Well, there are some instructions we sent to our salesmen that had defined that policy.

Q. That is what I say, defines; you have to define that policy and refine it in order to put it into practical use, don't you?

A. Well, I would say you would probably have to couch it in a little different language than—

Q. Well, what I mean is your actual practice is to divide sales more minutely than you have described on that announcement?

A. Well, I would say that is a matter of interpretation.

Q. Well, you do divide them more minutely—you say you issued further instructions?

A. Yes, we instruct our salesmen from time to time on points of our policy; tell them what our position is in the matter.

Q. Have you seen any announcement, mimeographed announcement of a division of sales?

A. None except our own.

Q. None except your own?

A. That is right.

Q. Are you familiar with the fact that we have in evidence here a mimeographed form headed "Market-
30819 ing Methods," which testimony has been taken about?

A. Oh, I think I have probably read that in the record.

Q. You have never seen that particular—

A. No, sir; I can tell you that I never have.

Q. Well, how do you sell an order of cement for a municipality to be used in the water works if the water

works is partially paid for by P.W.A. money and is outside the city limits?

A. Well, I think there are several things that would determine that, Mr. Paulson. You would—

Q. If you got an order like that—

Mr. Withrow: Your Honor, I submit the witness should be allowed to complete his answer.

Mr. Paulson: I had an answer.

The Witness: But the witness had not completed his answer.

You interrupted him.

Trial Examiner Norwood: The objection is overruled. You can bring that out.

By Mr. Paulson:

Q. If you received an order like that, would you immediately go to your office and look up your mimeographed instructions to salesmen?

A. Why, no.

Q. Do you know offhand how you would sell that?

30820 A. I would determine how I would sell that job, yes, the location of the job, the type of job that it was, and I would make my quotation and my prices on that basis. You would have to see the job; you would have to check the job.

Q. But is your dealer policy refined to the extent whether or not it was in a city limits it would make a difference?

A. Now, yes. If it was entirel within a city, according to our policy we would certainly expect that dealer to perform the services on that job.

Q. Do you find your policy, as you execute it, conforms exactly with those of your competitor, as you found those?

A. Well, I do not know as it would in every case. I recall one particular instance very definitely, where, according to our idea, the job was a direct sale, and we found out later that the contractor had been quoted by the dealers, the dealers very definitely told us in that particular, but we made the sale direct just the same, if I may add that.

Q. Do you know of any other instances than the two that you cited on page 30705 of the record; namely, where Keystone bid a P.W.A. proposal and Glens Falls Portland

Cement Company bid directly on another W.P.A. proposition, where your competitors did sell at—bid direct on W.P.A. proposals?

A. Yes. I received a report a short time ago that a company bid a W.P.A. proposal direct to the City of Rochester.

Q. That makes three. Do you know of any others?

30821 A. There might be some more, Mr. Paulson. I was just trying to—yes, I can give you one other one, and that was, as I recall—I cannot tell you the dates on this now—but that was in connection with some job up around Plattsburg.

Q. The general rule, as you found it, is for sales on W.P.A. projects to be made through dealers, is it not?

A. Well, that is our very definite policy, Mr. Paulson. We quote all of our W.P.A. business through dealers.

Q. I want to find out from you, Mr. Bates, about how you quote when you receive a notice of a change in freight rates. In the first place, will you tell me where you get your notice of a change in freight rates?

A. A change in freight rates, that comes to our traffic man from the railroad company.

Q. Does the railroad company make a practice of sending you—

A. They are sending changes in the tariffs all the time, to our traffic manager. That would be one point.

Q. Before we go any further, are you thoroughly familiar with your traffic department?

A. Well, I am not a traffic man. I am frank to admit I know very little about traffic, if that is what you want to know.

Q. Well, do you have supervisory duties over your traffic department?

A. Well, I cannot say that I do. Our traffic manager, he runs his department and I run my sales department.

30822 Q. It is not your duty to see that his department is run correctly, then?

A. Well, no, I cannot say that it is. It is the traffic manager's duty to see that.

Q. It is sort of a side-by-side proposition, you have one and he has the other?

A. That is right.

Q. And you are perhaps familiar with his work just by the demands you make upon him for services?

A. For traffic information; you are right.

Q. Well, do you happen to know whether or not he gets announcements of changes in freight rates from The Cement Institute?

A. Yes, he does.

Q. Do you call upon your traffic department to find out what the price is at destination points?

A. No, because those changes are issued to our department, and we make those changes.

Q. Well, there is an overlapping there, isn't there, in the work there; isn't there,—between your department and the traffic department in the pricing of your cement?

A. Well, I would not think so. If we get any changes in from The Cement Institute, we make the changes in our freight rate books, whatever the changes are. Our traffic manager checks those changes to see that they are
30823 correct in the tariffs, and that is that; that is the mechanics of it, so far as I can tell you.

Q. You put those correction sheets as they come from the Institute in the freight rate books, do you?

A. Well, yes, as soon as we receive them they go into our freight rate book, unless our traffic manager happened to ascertain that there was a correction in our territory where they were shipping, probably two or three times a week, that there was some change in the freight rate.

Q. You see, what I originally asked you, whether or not you knew from what source your first information of a change in freight rates came. Can you answer that more definitely?

A. Well, I would say they come both from our traffic manager and The Cement Institute; probably The Cement Institute sends in—oh, we get considerably more information on freight rate changes from the Institute than we would from our own traffic department.

Q. You do not know for sure, now, whether he gets the rates from the railroads prior to the time he gets the announcement from the Institute, or vice versa?

A. No, I could not answer that.

Q. In other words, you are not sure, then, whether or not you are quoting on the basis of a correct or incorrect

freight rate at the time, or shortly after a change in freight rates occur?

30824. A. Well, practically all the points that we are quoting, Mr. Paulson, are points that we have sold cement and are selling cement every week, and we know what the—if we have sold cement last week, and are shipping it at a certain rail rate, if the customer accepts the cement on the basis of that price, why, we certainly assume that that is correct.

Q. Yes. You use the Institute books until you get an announcement from the Institute that the rate has been changed; is that true?

A. Either that, or if our traffic department, in checking those freight rates, would find something of a rate that is not correct, he would call it to our attention and we would immediately use that rate.

Q. Now, that does not correspond with your testimony; there is an inconsisteney there, and I will ask you to explain it. You say that you make the change in your destination quotation when you get word of a change in freight rates from your traffic department, while in the next statement you say that you get your price—you sell at the price you find out in the field. Now, those are inconsistent, aren't they?

A. Well, we do sell at the price we find in the field, but, of course the price—

Q. Supposing you find a price in the field of $2.10 on a Thursday, and on that same Thursday your traffic man tells you that the freight rate changed to that des-

30825 tination point and that the base plus the freight is now $2.15. What do you sell at in that market?

A. At $2.10, whatever price we find that is in that market.

Q. And hasn't it been your experience that the price at those various destination points in your sales territory always correspond with the freight rate in the freight rate book, including the correction sheet information plus the controlling base?

A. Yes, generally speaking, I think you are absolutely right there. It is a pattern that we follow on basing prices, we use our freight rate, we add our package plus that constant figure that we have predetermined.

Q. Isn't it a fact that an announcement from the

Freight Rate Bureau of The Cement Institute of a change in freight rates is your key to change your prices at destination points?

A. If there has been an increase in the rates, certainly we would change our prices.

Q. And isn't it a fact you rely on that—I say, you wait for that announcement even though you had prior knowledge of a change from your traffic department, you would still wait until you got the correction sheet from the Institute?

A. Certainly not. We use the correct rate to that destination.

Q. Of course, we get back to that conflict: If the rate was up you would be quoting a higher destination
30826 price than you find in the field.

A. Well, I am talking now—I think you got two things in there, Mr. Paulson. You said if I found the price of $2.10, and a freight rate made my price $2.15, which price would I use, $2.15 or $2.10. If I wanted that particular business, we would have to say to that customer, "We will sell at $2.10." Now, here is the second part of it: You say to me that if we wait for the Institute freight rate sheets to come in, before we make a correction—

Q. Yes.

A. —so just suppose now there is a rate in our Institute book of, say, 8 cents a hundredweight, or 10 cents, or whatever it might be, and our traffic manager, in checking that book says to me that rate is incorrect, that should be 7 cents a hundredweight, and we ship a car, say; as soon as we found the error was in the book the next car we shipped to that point would be shipped on 7 cents a hundredweight.

Q. I understand that, but your quotation would still be made on the prior rate until you received announcement from the Institute?

A. No, our quotation would be based—if it was a point that the combination, the lowest combination was Buffalo plus freight plus package, our price would drop in that particular town, we would use the correct rate into that town.

30828 Q. Mr. Bates, did you say your quoted prices are a combination of base plus freight?

A. Yes, some of our prices could be traced back to that combination, the Buffalo price; our price is the market

price, but we attempt to price our cement to meet the market price at any particular destination.

Q. Generally, you say it falls in that pattern of base plus freight?

A. If it is in close proximity to Buffalo, yes, we take the Buffalo base and add on our freight to destination plus our package.

Q. The freight factor that you use in quoting prices is taken from the Institute freight rate books, is it not?

A. Why, I would say a large percentage of the cases; yes, sir.

Q. Did you say that you contracted with truckers to deliver your cement in the Buffalo area?

30829 A. No, sir; I don't believe I testified that; we have no contract carriers trucking our cement.

Q. Well, how do you deliver in Buffalo?

A. Well, we deliver by truck, but by what we term common carriers; we make no contract with this trucking company.

Q. Well, I meant, you hire some of your trucks.

A. Oh, yes, absolutely; yes, indeed.

Q. What is the base price? What is the Buffalo base now?

A. $1.60.

Q. And at other points in the city they would be paying $1.60 plus the minimum line haul of 22 or 23?—

A. Twenty-three.

Q. —which would be $1.83; that is the prevailing price in Buffalo?

A. Well, the prevailing price in Buffalo, with your package—you would have to add your package to that price, of course.

Q. Plus 15 cents, $1.83, plus 15 for paper, would make $1.98?

A. That's right.

Q. Is that the price in Buffalo?

A. That is the price in Buffalo.

Q. You really net more than the base, then, in your Buffalo sales, don't you?

A. Yes, I so testified yesterday, to that effect.

Q. What is the average trucking cost to you for

30830 deliveries there?

A. Our average in the City of Buffalo is 15 cents. As a matter of fact, it is, on the average, flat price to Buf-

falo, to the Buffalo trucking area, 15 cents a barrel; that's what the truckers charge us.

Q. Do you say that you do not allow deliveries under 40 barrels to Buffalo?

A. That is right; we have a minimum truckload quantity.

Q. Do any of your competitors allow deliveries under 40 barrels?

A. Do they allow deliveries?

Q. Yes, do they?

A. Do they make—

Q. Do they make deliveries?

A. Do they make deliveries,—our competitors?

Q. Yes.

A. Well, I don't know, I don't think they do. I think that 40 barrels' minimum, as I testified, was established because of the type of equipment that's prevalent in the Buffalo market. If we had—

Q. It was established, you say, by whom?

A. Well, it was there when we started the business.

Q. In 1933?

A. Yes, sir.

Q. Do you have many calls for deliveries of less 30831 than 40 barrels?

A. No, sir; we do not. I think I explained those cases yesterday when we would have a dealer come into our plant with his own equipment and pick up a few barrels of cement.

Q. You say you quoted delivered prices, Mr. Bates, but do you consider that you sell at delivered prices?

A. Well, we sell at whatever the market price is, if we want that particular piece of business. We meet the competitive price in that town.

Q. Well, I guess the question did not make itself clear. I said, you quote at delivered prices, but I wanted to know whether you considered that the sale is actually consummated at delivered prices?

A. Well, if we quote at a delivered price—if we quote a certain figure calling for delivery at a certain point, and we get that business, I would say yes, we sell at a delivered price, the price we quote.

Q. But prior to the institution of your prepaid policy in January of this year, you allowed your customer to pay the freight on sales made at destination?

A. Yes, we shipped considerable of our cement freight collect.

Q. And the freight bill was rendered to him by the railroad?

A. Yes, I imagine it was. Sure, it was. He paid the freight and we showed the freight deduction on our invoice.

30832 Q. Do you keep a record of sales in your office?

A. Yes, sir.

Q. When you made a delivery to a man, to a customer, how did you enter that on your sales record?

30834 A. Well, I cannot—I do not believe I can tell you exactly how that is; that is an accounting matter in 30835 the office that I do not come in contact with very often. I do not believe I can tell you. You mean as to the amounts that they enter on our books?

By Mr. Paulson:

Q. That is right.

A. No, I cannot tell you that from my own knowledge.

Q. I asked you one or two questions before lunch about these Government invitations for bids f.o.b. mill. I have one more question I wanted to ask you, and that is, did you give any study to the Government invitations that we referred to, to determine at what mill figure you might obtain business before you rejected the proposal?

A. No, I did not.

Q. How long after you received the bid did you reject it,—received the invitation?

A. Well, I could not tell you how long afterwards.

Q. How long after you got it did you make up your mind as to how to quote it?

A. Well, we did not quote on it.

Q. No, to reject it.

A. Well, some time prior to the receipt of the bids I decided I was not going to bid an f.o.b. mill price.

Q. You did not have anything to consider, really, did you,—your policy is not to bid f.o.b. mill?

A. Exactly, that is my policy and I still say it is 30836 my policy not to bid an f.o.b. mill price.

Q. You are not interested in any proposal that requests an f.o.b. mill price?

A. Oh, I would not say that. I think there are several factors that might determine my thoughts on the matter.

Q. Well, how would it hurt your business in your sales

territory for you to quote an f.o.b. mill price on one of these Government invitations which would get you business in a sales territory where you do not have any dealer?

A. Well, I do not care whether we quote an f.o.b. mill price on a proposal in China; if we are going to quote an f.o.b. mill price, Mr. Paulson, we are going to have an f.o.b. mill price to all of our customers. We cannot pick out the Government because it is the Government; we cannot make any special policy to take care of any particular type of customer. We have one policy of merchandising our product.

Q. The Government asked you for, or invited you to bid on a quantity of cement for use in Ohio, didn't it?

A. Yes, that was one of the proposals we received.

Q. You do not regularly sell in Ohio?

A. That is exactly right.

Q. You do not have any dealers there?

A. No, sir.

Q. You do not have any good will to protect, no dealers to protect there, no customers to protect in Ohio?

30837 A. That's right.

Q. Did you study that proposal that you received, —that invitation that you received,—to see whether or not you could go into Ohio at any decent mill net,—a satisfactory mill net?

A. No, sir; I did not.

Q. It was an opportunity?

A. I looked at the proposal.

Q. There was an opportunity presented to you there to get some business.

A. Well, if we had been marketing cement in Ohio, prior to the receipt of that bid—if we had been in the Ohio market and the prices that we would have received for our product had been satisfactory, we would have bid it if we wanted to.

Q. Well—

A. But I don't recall who asked me for a price. I think I still have a right to sell who I please when I please.

Q. Yes. But you felt restrained in bidding—restrained from bidding an f.o.b. mill price, didn't you, out of loyalty to the other members of the cement industry?

A. I certainly did not; that did not come into my mind whatsoever.

Q. Your refusal was not in part a bending or—bending

to the support of a general policy, general welfare of the industry?

A. No, sir; the policy of the Federal Portland Ce-
30838 ment Company is to not quote f.o.b. mill, and that's going to be our policy; Mr. Paulson, until we are convinced that the proper thing to do is to sell f.o.b. mill. When that time comes, that's what we are going to do.

Q. You feel it is for the welfare of the cement industry to sell exclusively at delivered prices, do you not?

A. Well, I am not—I can't—I can't tell you about the cement industry. I feel—

Q. Well, as a member of the industry you are interested in the welfare of the industry as a whole, aren't you?

A. Yes, naturally I am.

Q. And you feel it is to the welfare of the cement industry as a whole that they restrict their sales to delivered prices exclusively?

A. Yes, I think that's the only place we can restrict our sales to, where the cement is going to be used.

Q. And that is the reason—that is the main reason you did not bid f.o.b. mill on the Government invitation, isn't it?

A. Well, I don't know, Mr. Paulson, as I can add anything to what I have said. I told you how we felt about f.o.b. mill prices, and why we feel that way, and, as far as the Government's proposal, I could get one this afternoon for a million barrels of cement, and if they asked me for f.o.b. mill prices, the way I feel now, I wouldn't give it any more consideration that I did that 3 million barrels.

30840 Q. Oh, you said on direct, Mr. Bates, that you had no assurance your prices would be as low as competitors'; is that correct?

A. Yes, when I quote a price to any customer I am supposing—I assume that our prices will be as low. If we don't receive the particular piece of business, I won't know what the condition is until after I have checked it.

Q. You have had 15 years of experience to tell you that prices are quoted on base plus freight with rare exceptions in your territory?

A. Well, prices are made up from a very distinct pattern, I can assure you of that.

Q. They have been for 15 years?

A. But as far as—

Q. They have been all during your experience?

A. Well, I can say that they have been, the same procedure has been in effect.

Q. Hasn't that experience given you any assurance that when you quote base plus freight you will be identical with your competitors at a given destination point?

A. Well, the only assurance that we have that our price is identical with competitors is when customers are giving us business in the market.

Q. You have reason to believe, from your experience, have you not, that if you quote base plus freight,
30841 and use the freight taken from the Institute books in calculating your combination of base plus freight, you will be in the market at the same price as your competitors?

A. Yes, we hope to be, Mr. Paulson; we assume we will be.

Q. You have reasonable assurance that you will be if you do as I say, don't you?

A. Yes, if everybody would use the same formula that we use in composing that price, they would be the same.

Q. Well, your experience has been that they do use the same formula?

A. We have always used the same formula.

Q. And you have found that you have been identical with your competitors in all of your experience?

A. In a great many places, yes.

Q. Well, with rare exceptions; isn't that true?

A. Yes, I would say that—that with exceptions that it has been identical.

Q. Yes.

Have you any idea how much of your cement your dealers have disposed of on projects paid for in whole or in part by Government funds, Mr. Bates?

A. No, I wouldn't be able to give you that figure now, Mr. Paulson. I don't think that figure is obtainable.

Q. Well, have you any idea—I don't expect you to be accurate.

30842 A. No, sir; I don't. In some sections we might ship cement to a dealer, and he, in turn, would distribute that to some project in which there was some Government money so that we have no idea of how to trace that cement to that particular project.

Q. No.

In other words, you don't know the effect that Government buying has had upon your market?

A. Well, I know that it has had very little effect on the volume of business that we have received from the Government, as a direct sale to the company.

Q. Yes, but you don't know the sum total of it, of direct and indirect purchases by the Government?

A. No; I wouldn't. I don't have those figures available; I have never had any reason to.

Q. Have you, in your travels around your sales territory, observed a great many projects constituting the outlet for your cement, or paid for in whole or in part by the Federal Government?

A. Yes, there is no question about that.

I think we have even gotten down to the point now where the Government is financing private homes for people, so you could just go on and on, and I imagine you probably could trace quite a quantity of cement where there is Government money that is in there to pay for the

30843 cement that goes into the projects.

Q. As a matter of fact, the cement industry would have been in a sad plight for a market during the past five years had it not been for Government purchases, in your experience?

30844 A. Well, I can tell you this, in my experience, and that is what you have asked me, Mr. Paulson—that prior to 1933 the Federal Portland Cement Company, as an operating company, sold—did not sell; they manufactured considerably more cement than they ever have since 1933.

By Mr. Paulson:

Q. Yes.

A. And we sold it in the same market that we are selling cement now. So, I don't know, you could probably—

Q. What have you to say with regard to those five years about which I asked you?

A. Oh, I would say that the Government has, no doubt about it, they have made it possible to use and construct a number of buildings. They have been probably—a fairly good user of cement. As a matter of fact, everything is being built by the Government, or controlled by the Government nowadays.

Q. Hasn't it been your observation also that a good deal of the building done by the Government requires

heavy and large quantities of cement with relation to the other products that it requires?

A. Oh, I imagine cement, steel, and Washington
30845 stone, gets quite a little bit of that money, my observation is.

Q. Mr. Bates, you said that it was hopeless for you to reduce prices openly because your competitors would immediately meet it, and the general price level would become fixed at the point to which you reduced your prices.

That is a fair resume of what you said, isn't it?

A. I don't quite understand that word "hopeless."

Q. What is that?

A. I don't understand that word "hopeless," Mr. Paulson.

Q. Oh.

A. Didn't you say I said it would be hopeless for us to reduce—

Q. Yes.

A. —the price?

Q. Yes.

A. Well—

Trial Examiner Norwood: Do you want the question read?

30846 ("Q. Mr. Bates, you said that it was purposeless for you to reduce prices openly because your competitors would immediately meet it, and the general price level would become fixed at the point to which you reduced your prices.

"That is a fair resume of what you said, isn't it?")

A. Yes, I think I testified to the effect that no matter what price we put out that our competitors would meet it and we would all sink to the next step, the next lower level.

By Mr. Paulson:

Q. In other words, if you want to compete in price in the marketing of cement you must do it secretly; is that correct?

A. No, I would not subscribe to that at all. If we are going to make any prices, that is going to lower the price of our cement, we are not going to do it secretly, we are going to advertise the fact.

Q. Let me put it this way: If you want to reduce the price and get business by reducing prices, you must reduce prices secretly?

A. Well, yes, you probably could secure some business

by reducing the price, as you say secretly? It is pretty hard to keep a cement price secret.

Q. It is the only way that you can get business
30847 by reducing prices, if I understand your testimony?

A. Yes, you might get one particular piece of business by reducing the price secretly, but it would not be long until all of your business would be based on that.

Q. I am trying to eliminate the possibility—to eliminate—now, to find out whether or not you can openly reduce prices and get any business.

A. I would say that we cannot increase our business by reducing the price.

Q. That is your opinion?

A. That is my opinion.

Q. Based on your experience?

A. My experience in the business.

Q. So that leaves you with the alternative of having to reduce prices secretly if you want to get business?

A. Yes. Well, we certainly would not subscribe—

Q. Price basis, add that.

A. We have never been a subscriber to secret prices.

Q. No, but I say that is the only alternative that is left to you as the situation stands, isn't it,—secret price cutting, the only alternative?

A. Oh, yes, you could make a secret price, could, as I say, and probably accumulate one particular order on that.

Q. Oh, you say now that you cannot get business by cutting prices secretly?

30848 A. Why, certainly, I say this, that you can probably, by making a secret price to a contractor or to a customer, you can get a piece of business that he has to place at that particular moment.

Q. You haven't been able to, in your experience, to think of any way by which you can consistently and over a period of time cut prices and get business; is that true?

A. Well, I cannot subscribe to that, Mr. Paulson, because I have had no experience over a period of years in cutting prices.

Q. Have you tried to devise a means or find a means by which you could simply cut a price?

A. No, sir.

Q. You are not interested in getting business on a price basis?

A. We are at our price of cement.

Q. But you do not go out and cut prices?

A. Certainly not. If I go out to make a price I am going to make that to everybody. There is not going to be any one particular person who would get that price. I am going to give it to every one of our customers.

Q. But, couldn't you get business if you wanted to by reducing prices in this manner; namely, by telling a dealer that you will back him up if he will bid a little low, give him a secret price, you can get business.

30849 A. Are you telling me how to do it?

Trial Examiner Norwood: I think he has already told us he could do that.

By Mr. Paulson:

Q. You can get business that way?

A. Oh, yes, you probably could if you so desired, if that was the way in which you wanted to market your particular product, yes, but I had never—

Q. But you can get business away from your competitors simply by delivering more cement on a specific job contract than the job contract calls for, can't you?

A. Well yes, you could, I imagine.

Q. And isn't it because of that fact that you are interested in contract checking?

A. No, I do not—my interest in that contract checking, and that contract information—I presume that you are talking now about my testimony in The Cement Institute services. My interest in that was to find out where a small company, with a small sales organization stood on a job, and to find out quickly just what the position or the condition of a certain order is, or was. In other words, here is the way in which that operates. Our salesmen might be calling on a contractor for two or three weeks before the contractor will break down and say, "Well, I have already placed that business." It costs us a lot of money to follow that particular contract. Now,

30850 when we got the reports there as to who secured the business, we immediately close our file on that particular job.

Q. Well, it enables you to check on your own contracts, and it also enables you to protect yourselves against the sort of thing that I described; namely, that against the competitor of yours who delivered cement on a specific

job contract over and above the amount that was called for?

A. Well, our contracts, Mr. Paulson, are pretty carefully checked. We have our salesmen go out and ascertain the amount of cement in a job, and when we make a contract we do not try to make any fictitious contract. That is why we hire men who are trained in being able to check jobs.

Q. Has it been your experience any of your competitors made a practice of delivering more cement on a contract than the contract called for, particularly after a rise in prices?

A. No, I never experienced that. I know that we would not ship more cement. When the job is completed, we are through.

Q. But have you ever experienced a competitor doing that?

A. No, I have never run into that.

Q. On direct examination you said you were glad to get the announcement of a dealer policy in February, 1935. Why were you glad to get that announcement?

A. Well as I recall the situation at that time, there were dealers who had been grumbling for some policy and this just seemed to be a means of satisfying them.
30851 It was an announcement, a definite announcement after the Code was up in the air; that is about all I can tell you about it.

Q. Have you any knowledge of where the policy that was announced February 20th by all the cement companies originated?

A. Well, I can only tell you that the first policy that I saw was the policy of one of our chief competitors in Buffalo.

Q. Which competitor?

A. The Lehigh Cement Company.

Q. Have you any knowledge where the policy originated?

A. I presume it originated with the Lehigh Company in the Lehigh's office. It was certainly issued by them. That is all I know about it.

Q. Did you attend any meetings with regard to dealer policies with your competitors, or with dealers during that interim period there after Article XI of the Code was taken out, and before this announcement of policy?

A. No, sir; I did not.

Q. There was a chaotic condition there?

A. Dealers talked to me various times about they thought we should not do this and we should not do that.

Q. But you attended no meetings?

A. No, sir.

Q. Did you attend any Portland Cement Association meetings during that period?

30852 A. Oh, I have attended Portland Cement Association meetings, yes.

Q. Did you hear any discussion of this dealer policy proposition at those meetings?

A. Mr. Paulson, at those Portland Cement Association meetings I have never heard anything discussed regarding policy or price.

Q. At your dinners or at the banquets after the sessions?

A. No, sir; I recall attending several of those banquets. All you could hear there would be, well, experience, somebody was down playing golf in the South, or somebody was up fishing in the North, and as far as discussing the policy of the cement company, I can say that I never heard that at any Portland Association meetings.

Q. Are your terms and conditions of sale identical with competitors, so far as you know, Mr. Bates?

A. So far as I know, they have got to be.

Q. And they are?

A. And they are, as far as I know.

30853 Q. Do you know where your traffic department gets the rate it places on bills-of-lading now that you prepay the freight?

A. Yes, I think they take that out of the——

Q. Do you know, first?

A. No, I can't tell you whether they use the freight rate book or whether they go to the tariff.

Q. Well, we better leave that, then.

A. All right.

Q. Are you a member of the Portland Cement Association?

A. We are now; yes, sir.

Q. How long have you been a member?

A. Well, if my memory is right, I think we joined in the beginning of 1938.

30859 *Redirect Examination by Mr. Withrow.*

30860 Q. Now, Mr. Bates, I would like to show you Respondents' Exhibit 208, and I see down here Zone 1-B, no bid; Zone 2-A, Huron; Zone 2-B, Huron. When was that information put on that map?

A. After I received the tabulation of bids from one of our officers.

Q. So that that was not put on prior to the opening of the bids?

A. No, sir.

Q. Now, Mr. Bates, when you or one of your salesmen wants to sell cement in Buffalo do you or does he have to calculate the price in Buffalo?

A. No, he knows what the price is in Buffalo.

Q. Are you generally familiar, Mr. Bates, with the price at which you sell cement, say, in Rochester?

A. Yes, generally.

Q. Well, do you sell to dealers in the suburbs of Rochester at the same price you sell to dealers you have in Rochester?

30861 A. Yes, we sell Brighton, N. Y., which is a suburb of Rochester, and East Rochester.

Q. And you do this in spite of the fact that there is a difference in freight rates from Buffalo to Rochester and East Rochester?

A. Yes, to put all of our dealers in the Rochester market in the same competitive position.

30865 DAVID H. MacFARLAND, called as a witness for Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Withrow.

I am associated with the Medusa Portland Cement Company, and have been with Medusa since April 1, 1930.

30866 Prior to that time I was associated with the Atlas Portland Cement Company. I became associated with Atlas January 1, 1908. Prior to January 1, 1908, I was in the railroad business; I was an accountant, freight auditor, and assistant comptroller of the New Jersey Central Railroad. When I came to Medusa on April 1, 1930, I was

assistant to the president; later, in December of that year, I was elected vice president; I have been an officer of The Cement Institute.

The witness identified Resp. Ex. 2154 A-B as minutes of The Cement Institute meeting of March 19, 1931.

30867 That was the meeting at which he was elected president.

(RESP. EX. 2154-A and 2154-B was offered and received in evidence.)

Q. Mr. MacFarland, those minutes are dated March 19, 1931, and that is your election as president.

30868 Had you started to act as president of the Institute prior to that time?

A. No, I had not.

Q. Now, do you recall a meeting of the board of trustees of May 12, 1931?

A. I would have to have my memory refreshed, I guess.

Q. Well, I show you Commission's Exhibit 136-3-K and 3-L, and ask you if that refreshes your recollection (handing document to witness)?

A. It does.

Q. Was that the first meeting that you presided over as president of the Institute after your election in March, 1931?

A. Yes, that was the first meeting after the date of my election.

30869 Q. Do those minutes correctly reflect what took place at that meeting, to your recollection?

A. They do.

Q. So that it was at that meeting that a number of the companies resigned from The Cement Institute?

A. A number of the companies resigned, and we ceased performing practically all of the functions of the In-

30870 stitute except maintenance of rate bureaus.

Q. So that the activities of the Institute were curtailed as of May 12, 1931; is that right?

A. That is correct.

Q. Now, were there any other meetings of The Cement Institute in 1931, to your knowledge?

A. I don't recall of any.

Q. Were there any meetings of The Cement Institute in 1932?

A. I would say not; that's my recollection.

Q. When was the next meeting of The Cement Institute, approximately?

A. It was, I think, in 1933, if that's the date when the formation of the N. R. A. took place,—or about that date.

Q. Now, was that around June, 1933?

A. I would say so.

Q. Now, what happened during this period from May, 1933, to June, 1933, in so far as activities of The Cement Institute go?

A. There were no activities except the maintenance of a rate bureau, and my duties were principally looking after the financial situation. We had quite a large sum of money intact, and we wanted to maintain it without squan-
30871 dering it, and at the same time carry on the rate service.

Q. Now, would you tell us whether or not the Institute had lost many of its members during this period?

A. It had lost a number of the members.

Q. Do you remember about how many companies belonged to the Institute around June, 1930?

A. I would say, from my best recollection, after the resignation of a number of the companies, there were probably somewhere between fifteen and twenty left.

Q. Well, how many were there,—the highest number,—before those resignations started, that you recall?

A. Oh, somewhere between forty-five and fifty, is my guess; and that is my recollection.

The witness identified Resp. Ex. 2155 A, B and C, as copies of minutes of The Cement Institute when he was president.

Voir Dire Examination by Mr. MacIntyre.

30872 The witness has not verified this copy of the minutes with the original minutes of that meeting. He would say that to the best of his recollection they are exactly as reported by Mr. Lundborg, the secretary, as the proceedings of the meeting.

30873 (RESP. EX. 2155-A, 2155-B, 2155-C, and 2155-D was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. MacFarland, does that Respondents' exhibit refresh your recollection as to the number of companies that were members of The Cement Institute during this dormant period in 1932 and early 1933?

A. It does. There seems to be twenty-

Q. Now, do you recall, Mr. MacFarland, whether or not you considered calling a meeting of The Cement Institute in June, 1932?

A. Yes, there was a meeting called. I do not recall in just what shape it was, but I know that Mr. Coffin, who is one of the trustees, and I got together and discussed the matter.

Q. Was that June, '32, or 1933?

30874 A. 1933.

Q. Well, I asked you if you considered calling a meeting in June, 1932, for any reason.

A. In June, 1932? The date is not quite clear, but in 1932 I have a recollection that I discussed with one or two of the remaining trustees the idea that I did not want to be held responsible for carrying on, taking care of the finances, and carrying on this rate bureau unless the membership felt that it should be done, but I do not think there was any meeting called.

Q. Well, did the trustees of The Cement Institute hold any meeting during the period from May, 1931, to May, 1933?

A. My recollection is they did not; if there was any meeting the minutes would show it.

Q. Now, during this period in 1931, in 1932, and early 1933, do you recall whether you sent out any executive or special letters to the members of the Institute?

A. I do not recall definitely, although it seems to me that there was something up during that period when there was a Federal Trade examination coming on that I think we had the secretary send out a notice. I am not sure of it, though.

30882 Q. Now, you have testified, Mr. MacFarland, that the Institute was reestablished or revised around June, 1933?

A. Yes.

Q. Could you give us your recollection as to the steps that were gone through at that time?

A. We sent notice—and I have forgotten whether or not it was written at that time, or by telephone, or by word of mouth—to practically everybody who had been members of the Institute before their resignations, with the idea in mind that the Institute reestablished along proper

lines would be a very useful feature in connection
30883 with the N.R.A. That's the reason of the notices that were sent out,—the members that were left who were in attendance either directly or by proxy,—and we had a great many other members come in about that time.

Q. And was Mr. George Coffin, of the Nazareth Company, active in the reestablishment?

A. Yes, he was active, and he has remained one of the trustees during all of the period.

Q. And is he now alive?

A. No.

Q. Mr. MacFarland, I show you Federal Trade Commission Exhibit 1032-P and Q, and ask you if you recall that letter (handing document to witness)?

A. Yes, that's a letter that I sent out on May 17, 1933, to practically all of the cement companies.

Q. Do you recall the circumstances under which you sent out this letter?

A. It was reciting an editorial in "Business Week," May 17, 1933.

Q. Would you tell us whether or not that letter represented one of your attempts to interest the various members in the industry in The Cement Institute?

A. Yes, it was.

Q. And do you recall whether or not that was the first general letter which you mailed out to your members of the Institute, and other manufacturers, after the
30884 letters which you sent out about the Federal Trade Commission questionnaire?

A. Well, it would be hard to say definitely, but I think —my recollection would be that that is the first one.

Q. Now, the copy of the letter you have there is addressed to the Calaveras Company,—do I get your testimony correctly that you sent that to a great number of cement companies?

A. Yes, I—the letter speaks for itself. I said we were addressing this letter to all cement companies.

Q. There is some reference, Mr. MacFarland, in Respondents' Exhibit 1084, to some conferences of persons interested in reviving the Institute during the week of May 15 to 20, 1933. Did you attend those conferences, if you recall?

A. I think there is no question but that I did.

Q. What were the matters discussed, if you recall?

A. I would say that was the thought of reviving the Institute.

Q. Do you know whether or not this was the first meeting of any kind of The Cement Institute since May 31—I mean these conferences for its revival?

A. No, there were no meetings at all excepting this meeting in June, I think it was, 1933.

30886 The witness identified Resp. Exs. 2166 and 2167 as letters with which he was familiar at the time that they were written. He would not say definitely that they were authorized by him to be written. Mr. Coffin was one of the trustees. Mr. Coffin wrote the letter, and "we" discussed it. It was in connection with the revival of the Institute.

Examination by Examiner Norwood.

30887 That was written by Mr. Coffin on his own account. He did not sign it as trustee, but this one is the form sent as a suggested application for reinstatement as member of the Institute by Mr. Coffin, as a trustee. "We" had discussed the matters.

Examination by Mr. Withrow.

Mr. Coffin, as trustee, was authorized to attempt to get members to join the Institute. That was one of his jobs as trustee. Mr. Coffin and the witness were both looking after getting back the members during that period 30888 of the NRA when it was established. He further identified Resp. Ex. 2169 as a letter with which he was familiar. Mr. Coffin was authorized to send that out on behalf of The Cement Institute. That one is written as Chairman of The Cement Institute, and on the Cement Institute letterhead.

Examination by Examiner Norwood.

The witness identifies it as something that The Cement Institute did send out. He further identified Resp. 30889 Ex. 2170 A to H to the best of his recollection, as a copy of the new proposed articles of association of

The Cement Institute taken from the minutes of the Institute. They were proposed articles for the reestablishment of the Institute.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. MacFarland, can you tell me when and under what circumstances you first saw the Respondents' exhibits for identification, 2167 and 2166?

Mr. Withrow: Could I have that question read?

Trial Examiner Norwood: Read the question.

(Question read.)

30891 A. Well, it was about just before the 20th of May when they were written. I recall Mr. Coffin discussing the letters with me that he was to send out to the various cement companies.

By Mr. MacIntyre:

Q. Did you receive these two from Mr. Coffin?

A. I would not testify unless I looked through my files that I actually received them, but I do recall their being sent out, and I think there is no doubt but what one came to me, in our company.

Q. What do you recall about them being sent out, Mr. MacFarland?

A. I recall the general talks we had about that time.

Q. I am talking about these two documents now?

A. What?

Q. I am talking about these two documents now. What do you recall about those documents having been sent out by Mr. Coffin?

Mr. Withrow: Your Honor, he just answered that question specifically.

Trial Examiner Norwood: Let him answer it again.

A. Well, about the discussion of the advisability of reestablishing The Cement Institute.

By Mr. MacIntyre:

Q. Well, I am talking about those two documents rather than a discussion now.

30892 A. Well, they referred to it.

Q. Well, how did you get that discussion with these two documents that you are holding in your hand, Respondents' Exhibits 2166 and 2167?

Trial Examiner Norwood: Do they contain the substance of that discussion?

The Witness: Yes; yes, they do.

Trial Examiner Norwood: That is what you agreed on?

The Witness: Yes.

By Mr. MacIntyre:

Q. Well, did you receive the documents?

A. Well, I testified that I would not be clear under oath that I had received them, although I remember very distinctly the discussions in connection with them.

Q. Well, when did you first see these two documents, Respondents' Exhibits 2166 and 2167?

A. These particular documents?

Q. Yes, those two pieces of paper.

A. Just now.

Q. The first time you ever saw them?

A. Yes. I do not recall seeing them before.

Q. That was when Mr. Withrow handed them to you?

A. Yes.

Q. Can you tell me whether or not on or about May 20, 1933, you wrote a letter to Mr. John Treanor, as
30893 president of The Cement Institute?

30894 Q. When did you first see Respondents' Exhibit, for identification, 2169?

A. I do not recall ever seeing that before it was presented here.

By Mr. Withrow:

Q. Did you ever see a copy of it, Mr. MacFarland?

A. Probably—oh, undoubtedly, in our Cement Institute, because it was written by Mr. Coffin, as chairman of The Cement Institute committee, which was, as I recall, that committee which was set up to reestablish the Institute.

Trial Examiner Norwood: Is that his signature?

30895 The Witness: That is signed by Mr. Coffin,—apparently by his secretary. It has an "R" under it.

Trial Examiner Norwood: What is the number of that?

Mr. MacIntyre: 2169.

The Witness: 2169.

By Mr. MacIntyre:

Q. Well, do you know whether or not that Mr. Coffin ever sent this letter around and that you did receive a copy of it? What do you recall about that, Mr. MacFarland?

A. Why, the attempt in the reorganization of The Ce-

ment Institute to get together a new set of articles and constitution and by-laws.

Q. I am asking about the specific document now rather than about some activity.

A. This does refer to that.

Q. Well, of course, it may refer to it. I am asking you what you know about the document itself, as such. We are talking about the document now.

A. I do not quite get the question.

Q. I asked you what recollection that you have about the document, as such—that is, this Respondents' Exhibit 2169, if you know anything about it, have any recollection?

Trail Examiner Norwood: Did you ever see it before; know anything about it, or receive it or act on it?

30896 The Witness: Why, it is a document that I recall was sent out to the cement industry by Mr. Coffin, as chairman of the committee, which was sent to get the Institute back together, and for the purpose of getting together a new set of by-laws.

Trial Examiner Norwood: You recall that was the notice sent out?

The Witness: Yes.

Trial Examiner Norwood: What number is that, 69?

Mr. MacIntyre: 2169.

By Mr. MacIntyre:

Q. Do you know where this letter was sent to?

A. Sent to all cement manufacturers.

Q. You are certain of that?

A. Well, the record will show it.

Q. What is the first time you ever saw Respondents' Exhibit, for identification, 2170-A to H?

A. Well, in all probability—I cannot testify directly—but in all probability, if this came out—

Trial Examiner Norwood: Well, he is asking you what you know about it.

By Mr. MacIntyre:

Q. I am asking you for your knowledge.

A. I never saw this before today here.

Q. And you have no knowledge or recollection about it then?

30897 A. Unless it was in the original documents of the Institute, and, if so, that is the paper.

Q. That would be your natural assumption if it were found there?

A. Yes.

30905 Washington, D. C.,
January 19, 1940.

30906 DAVID H. MacFARLAND thereupon resumed the stand and testified further as follows:

Direct Examination (Continued).

30908 Trial Examiner Norwood: That is Respondents' Exhibit 2170-A to H.

I think they have a right to put those articles of association in, if they are not already in.

Mr. MacIntyre: May I see that one?

Trial Examiner Norwood: Now, as for certain letters which you say would indicate a dormant period in the life of the Institute, the witness who wrote those documents and received them is on the stand and he can tell us about that. I do not see that there is any use of receiving those. These telegrams here, they are duplications in this proffer here.

Is that the articles of association on which this Institute was reorganized at the time you speak of, Mr. MacFarland?

The Witness: Which, the proposed articles,—and I could not say definitely whether they are exactly the articles as adopted.

Trial Examiner Norwood: Oh, these are the pro-
30909 posed articles?

The Witness: They were the proposed articles.

Trial Examiner Norwood: I do not think we are interested in the proposed document.

Mr. MacIntyre: May I ask the witness a further question on those on voir dire?

Trial Examiner Norwood: Yes.

Examination on Voir Dire by Mr. MacIntyre.

Q. Can you tell me when these were proposed? They carry no date. Was it during the formation of The Cement Institute in 1929, or just when?

Mr. Withrow: We might save some time by showing the witness the covering letter which enclosed those documents.

Trial Examiner Norwood: What number is that?

Mr. Withrow: The number right in front of that, Your Honor.

Trial Examiner Norwood: 2170?

Mr. Withrow: This is 2170; 2169 is the covering letter.

Trial Examiner Norwood: Yes.

Mr. Withrow: Covering that document.

Trial Examiner Norwood: That is from Mr. Coffin (handing document to the witness).

30910 The Witness: I would say those are the suggested amended articles to reestablish the Institute during the period in 1933.

By Mr. MacIntyre:

Q. They were suggestions, then, that were put forward by Mr. Coffin during 1933?

A. During 1933, yes, with the application—

Q. They were the suggestions that he put forward?

A. Suggestions put forward as a result of the attorney's advice, Colonel Donovan's advice.

Q. That is, Mr. Coffin put them forward on the advice of Colonel Donovan, or—

A. Yes, as chairman of the committee for the reestablishment of the Institute on a working basis.

Q. Who was the chairman of the Institute, Colonel Donovan or—

A. No, Mr. Coffin.

Q. —Mr. Coffin?

A. Yes.

Q. Were these adopted as shown by Respondents' Exhibit, for identification, 2170—were they adopted or just what became of the status of that? What part did that play in The Cement Institute?

A. I couldn't testify to that without the records, or the minutes, when the final articles were adopted.

30911 Q. Do you know anything other than that they were proposed?

A. The minutes will show the record—

Q. But you have no knowledge other than that they were proposed?

A. None other than the minutes.

30916 (RESP. EXS. 2169 and 2170-A to 2170-H were offered and received in evidence.)

By Mr. Withrow:

30918 Now, yesterday, Your Honor, I offered an exhibit in evidence, Respondents' Exhibit 2155-A, B, and C.

I now have a photostat of those minutes from the original minute book, and it turns out that the original minutes are four pages. I would like to have this substituted, and have the document marked "Respondents' Exhibit 2155-A to D."

Trial Examiner Norwood: Make the change.

30919 (Resp. Ex. 2155-A, 2155-B and 2155-C, was replaced with a document marked RESP. EX. 2155-A, 2155-B, 2155-C, 2155-D, which was received in evidence.)

By Mr. Withrow:

Q. Mr. MacFarland, were the articles of association of the Institute revised around June, 1933?

A. That is my recollection.

Q. And there has been considerable talk about Mr. Coffin's position. Just exactly what was his position with reference to the reorganization of the Institute?

A. Mr. Coffin was one of the trustees that remained in the Institute during the period when it was inactive, being one of the companies that had not resigned, and when the revival came about he was selected as chairman of a committee to interest the other people in the industry to again make application for membership in the revived Institute.

Q. Now, did Mr. Coffin have any position with reference to drafting an N.R.A. Code for the industry?

A. I could not say. My recollection is not clear upon that.

Q. Mr. MacFarland, I show you Respondents' Exhibit 2155-A to D, and ask you to look at that and tell me whether those minutes reflect what you recall as having taken place at the special meeting of the members, June 10, 1933?

30921 A. They do.

By Mr. Withrow:

Q. And was it at this meeting that the articles of association of The Cement Institute were amended?

A. Yes, sir; at this meeting.

30922 The witness identified Resp. Ex. 2172 as a letter written and signed by him in his capacity as president of the Cement Institute.

Mr. Withrow: I am not offering the handwriting appearing on the face of the document other than the witness' signature (handing the document to Mr. MacIntyre).

(RESP. EX. 2172 was offered and received in evidence.)

Q. I show you, Mr. MacFarland, Federal Trade Com-

mission's Exhibit 596-A to C, and ask you if you recall this meeting, special meeting of the members, June 15, 1933?

30923 A. I do.

Q. And will you tell us whether or not those minutes reflect what took place at that special meeting of the members on June 15, 1933?

A. They do.

Q. And is that the meeting where the members of The Cement Institute approved the amendments to the articles of association?

A. It is.

The witness identified Resp. Ex. 2173-A to E as the minutes of a meeting of the Board of Trustees of June 15, 1933. They reflect what he recalls took place at that meeting of the Board of Trustees.

30928 (RESP. EX. 2173-A to 2173-E was offered and received in evidence.)

Q. Mr. MacFarland, there is some testimony in the record that in 1929 and in 1930 the Institute did not receive members into the organization from the Pacific Coast.

Would you tell us whether or not in 1933 this policy was changed?

A. Well, I would have to look at the record. My recollection is that it was changed, and the Pacific Coast members came in; but that's a matter of record.

Q. Now, do you recall a meeting of the board of trustees—

30929 The witness identified Resp. Ex. 2174-A to D as the minutes of the adjourned meeting of the Board of Trustees on June 16, 1933, adjourned from June 15, 1933.

(RESP. EX. 2174-A to 2174-D, was offered and re-
30930 ceived in evidence.)

By Mr. Withrow:

Q. Mr. MacFarland, I will ask you to examine Respondents' Exhibit 2174-A to D, and ask you if this contains what you recall as having transpired at this adjourned
30931 meeting of the trustees of June 16, 1933 (handing document to witness)?

A. (Witness examines document.) The question, please?

(Last question read.)

A. It does.

Q. Now, Mr. MacFarland, Respondents' Exhibit 2173 and Respondents' Exhibit 2174 are minutes of trustees' meeting on June 15 and June 16, 1933. Would you tell the Examiner what the occasion was for such a prolonged meeting of the trustees?

A. That was occasioned by the complexities of the Code as being prepared. There had been many requests received requesting various articles to be inserted in the Code, and there was considerable discussion about the adopting of the Code for the N. R. A.

The witness identified Resp. Ex. 2175-A, B as sent out pursuant to his directions as president of the Ce-
30932 ment Institute for the purpose of electing a member of the Board of Trustees of the Cement Institute for District No. 2. It is his recollection that about the same time, that is June 19, 1933, the other districts were asked to elect their district trustees.

30933 (RESP. EX. 2175-A and 2175-B was offered and received in evidence.)

30940 Q. Mr. MacFarland, did you take part in the negotiations,—at the beginning of the negotiations, —concerning a provision classifying business in the N.R.A. Code for the Cement Industry?

30941 A. I did, in the meeting in Chicago on—I think it was June 23d.

Q. Would you tell us, if you know, what the reason was for including such a provision in the N.R.A. Code?

A. What provision are you—

Q. The Article XI.

A. Oh.—

Q. The dealer-customer classification.

A. Well, that was with the idea in mind that if we didn't take care of that situation when the dealers and contractors came in for their Code that might have the effect of throwing out our Code or changing it,—if it was not worked out in a satisfactory way for them.

Mr. Withrow: Now, Your Honor, I have had marked for identification Respondents' Exhibit 2177-A and B. It was submitted under subpoena. It was marked F.T.C. Exhibit 798-2-D and 2-E.

I am asking Counsel to examine it (handing document to Mr. MacIntyre).

Mr. MacIntyre: Are you offering this?

Trial Examiner Norwood: Yes.

Mr. Withrow: I am offering it.

Mr. MacIntyre: We have no objection as to the authenticity of the document, but we just do not see that it is material to the issues here (handing document 30942 to the Trial Examiner).

Trial Examiner Norwood (After examining document): I do not see that this adds anything.

Mr. Withrow: Well, Your Honor, Commission's Exhibit 606-A to J, inclusive, are minutes of the board of trustees' meeting in Chicago on the same day, and I am offering this to complete the picture of what was actually transacted on that. It shows the organization of the district trustees under the new articles of association. It was the first activity under the new articles of association, and is really the actual—first actual functioning of the Institute after the revival.

Trial Examiner Norwood: Yes.

Mr. Withrow: And I am only offering it for that purpose. It is the only minutes, as I recall, in this early period, which are not now in evidence; it is the last one, and I think should be received to complete the picture.

Trial Examiner Norwood: I will receive it.

(RESP. EX 2177-A and 2177-B was offered and received in evidence.)

By Mr. Withrow:

Q. Now, Mr. MacFarland, I show you Commission's Exhibit 606-A to J, and ask you if you recall this 30943 meeting of the board of trustees of June 27 and 28, 1933 (handing document to witness)?

A. (Witness examines document.) The question, please?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. I do.

Q. Now, is that the meeting, Mr. MacFarland, at which you resigned as president of The Cement Institute?

A. Yes, that's the meeting at which I resigned as president.

Q. Why did you resign as president?

A. Because my duties I had figured had been completed. I had simply accepted the presidency during the period from 1921—or, 1931 to 1933, during the time the association, or the Institute, rather, was doing nothing but taking care of the rate service and conserving the funds.

When the Code situation came about, the Institute was resuming its full activities. I felt that I could not take the time necessary to properly handle the position as president, and, further, about that time I had practically ceased all of my activities in connection with the gray cement situation in the Medusa Company, having transferred all of my activities to these other departments—other products.

Q. Would you tell us whether, from your examination of those minutes, Commission's Exhibit 606-A to J, they reflect what you recall as having taken place at that meeting?

A. They do.

30944 Q. Would you tell us what was the major item under discussion at that meeting?

A. The discussion of the Code.

By Mr. Withrow:

Q. So that this two-day meeting of the board of trustees was another one of the meetings about the proposed N. R. A. Code for the Cement Industry?

A. Yes.

30945 (RESP. EX. 2178 was offered and received in evidence.)

Q. Mr. MacFarland, was that meeting of June 27 and 28, 1933, the last meeting of the Institute which you attended?

A. It was.

Q. Did you ever attend a meeting of The Cement Institute, a trustees' meeting of The Cement Institute, as proxy for J. B. John, after that time?

A. It is hard to recollect the time. I know that I did attend one or two meetings as a proxy for him, but I—

Q. I will show you Commission's Exhibit 611-A to F, and ask you if this refreshes your recollecton as to whether you attended a meeting after that as proxy for Mr. J. B. John (handing document to witness)?

A. Yes, a meeting on September 14 and 15, 1933, in Washington.

Q. Do you recall having attended any others, or any, after that September meeting?

A. I don't recall it.

Q. Now, after you ceased to be president of the Institute, did you take an active part in the Institute work?

A. I did not.

30946 Q. Now, since, oh, around the middle of 1933, would you tell us whether or not your activity in the

Medusa Company has ceased to be in connection with their sales of standard gray Portland cement?

A. Very largely; in fact, doing practically nothing in connection with the gray Portland cement except occasionally when I could turn over some business.

Q. And that was about the time you ceased to have any activity with the Institute; is that correct?

A. Yes.

Q. Mr. MacFarland, I show you Commission's Exhibit 606-I, and ask you whether or not this refreshes your recollection as to when Mr. Mallory first became statistician for The Cement Institute?

A It was in the meeting of June 27, 1933, at the Blackstone in Chicago.

Q. To your knowledge, was Mr. Mallory ever statistician of The Cement Institute prior to that time?

A. He never was during the time I was president.

30947 Q. Now, Mr. MacFarland, did you attend the organization meeting of The Cement Institute in August, 1929?

A. I do not recall that.

Q. Well, I show you Commission's Exhibit 136-

30948 A to F, and ask you if this refreshes your recollection as to whether you attended—

A. Yes, I did.

Q. And those minutes indicate that you were secretary for that meeting. Do you recall that, Mr. MacFarland?

A. Yes. That was at the time I was with the Atlas Company.

Q. And could you tell us whether those minutes correctly state what you recall as having taken place at that meeting?

A. They do, to the best of my recollection.

Q. Now, were you secretary of the Institute at that time?

A. No, simply acting as secretary of a meeting that was called for the purpose of organizing the Institute.

Q. Now, I show you Commission's Exhibit 136-G to J, inclusive, and ask you if this is the second organization meeting of the Institute, and if it refreshes your recollection about that meeting?

A. It is, and it refreshes my recollection.

Q. And that was a meeting of August 20, 1929; is that correct?

A. August 20, 1929.

Q. And were you the secretary of that meeting, also?
A. Secretary of the meeting, yes.
Q. Not of the Institute?
30949 A. No.
Q. And do those minutes correctly state what you recall to have taken place at that meeting?
A. They do.
Q. Now, do you recall or do you remember any other organization meetings of the Institute which you attended?
A. I do not remember any.
Q. Now, did you become an officer or trustee of the Institute back in 1929?
A. I do not recall having been.
Q. I show you—
A. It is a long time ago.
Q. I show you Commission's Exhibit 136-S and T, and ask you whether this refreshes your recollection as to what capacity you attended this board of directors' meeting.
A. I attended that meeting as a proxy for Mr. Burch.
Q. And Mr. Burch was a trustee?
A. Mr. Burch was a trustee.
Q. And do those minutes, Commission's Exhibit 136-S and T, correctly describe what you recall as having taken place at that meeting?
A. They do.
Q. Now, I show you Commission's Exhibit 136-U to X, inclusive, and ask you if this refreshes your recollection about attending a meeting on December 13, 1929?
30951 The Witness: It does.

By Mr. Withrow:
Q. Now, do these minutes correctly reflect what you recall as having transpired at that meeting?
A. I wouldn't want to testify that I would recall that; I think the minutes speak for themselves.
30952 Q. Well, I see in the third full paragraph which states, I believe:
"Mr. MacFarland was asked to take up with Mr. Walter Young, the head of this Bureau, the various rate situations in which members of the Institute were interested."
Did you ever act pursuant to that request?
A. My recollection is I did not act.

By Mr. Withrow:
Q. Do you recall what these rate situations were referred to in the minutes?

A. Why, this Mr. Young was trying to organize
30953 a rate bureau, and going to the different cement companies to subscribe to the bureau. When the matter was taken up with me, I had known what Mr. Young was planning to do, what price he was planning to charge, and from my experience in the railroad business, where I had checked rates for a matter of seven or eight years, I felt sure that Mr. Young could not do what he proposed to do for the money he was asking, and, therefore, I thought it absolutely unnecessary even to take it up, because I felt it would be a failure.

Q. Well, I ask you to look at Commission's Exhibit 136-2-A to 2-P, commencing on the fourth page at the bottom, a report by the manager of the Institute, and ask you if that refreshes your recollection as to whether you attended that meeting (handing document to witness)?

A. It does.

30955 Q. In what capacity, Mr. MacFarland, did you attend this meeting of January 7, 1930?

A. At that time I was acting as provisional assistant to the president of the Universal Atlas Company.

Q. That was after the merger?

A. After the purchase of the Atlas Company by the Universal.

Q. And I ask you to look at those minutes, and ask you to tell me if those minutes coincide with what took place at that meeting, in so far as you can recollect?

A. I would say that the minutes would have to stand on the record; it would be hard for me to recollect that.

Q. Did you make a statement at that meeting that the Universal-Atlas Company was going to join The Cement Institute?

A. I certainly did not.

Q. Was any agreement entered into at that meeting of January 7, 1930, to allocate business or restrict production?

A. Not so far as I was concerned; I never had
30956 anything to do with it.

Trial Examiner Norwood: Well, did you know of any—

The Witness: No.

Trial Examiner Norwood: —such agreement—

The Witness: No.

Trial Examiner Norwood: —between others?

The Witness: No.

By Mr. Withrow:

Q. Well, would you now look at Commission's Exhibit 136-2-A to 2-P, and see if there is anything in there that refreshes your recollection to the contrary?

30959 A. Well, I recall the meeting very distinctly as a meeting, but so far as the details are concerned, I wouldn't want to testify to that. There are certain things that recall that meeting to me very distinctly, because at that time I was in negotiation with Mr. John to go with the Medusa Company—

Trial Examiner Norwood: Yes.

A. —and I recall, when you show me the minutes of the meeting, and my presence there, I recall various things in connection with it; but, so far as the details are concerned, I wouldn't want to, at this time, this late time, say that I remembered all of the details, but I do recall very distinctly that there was no discussion in connection with allocation of business, or anything of that kind.

30960 Q. Mr. MacFarland, do you recall whether Mr. Stone made any representation at this meeting of January 7, 1930, that the Universal Atlas Company was going to join The Cement Institute?

A. My recollection is Mr. Stone said that he could not say what their position would be.

30962 Q. Mr. MacFarland, did you ever attend another meeting of the Chicago division of The Cement Institute, do you recall?

A. It would be pretty hard for me to recall unless I knew something about it.

Q. Well, I will show you Commission's Exhibit 137-A and B, and ask you whether that refreshes your recollection as to whether you attended.

Trial Examiner Norwood: What is that?

Mr. Withrow: Minutes of a meeting.

A. Yes, I recall that meeting.

30963 Q. Now, these minutes purport to be dated January 8, 1930, Mr. MacFarland, and show that you attended representing the Medusa Company. Did you represent the Medusa Company January 8, 1930?

A. No, I did not. That date must be wrong.

Q. When did you say you came with the Medusa Company?

A. April 1, 1930.

Mr. Withrow: I would like to ask Counsel for the Com-

mission at this time to agree with me that the minutes that they offered in evidence, Exhibit 137-A and B, are minutes of a meeting of Tuesday, April 8, 1930. The reference on their typewritten copy which they offered is incorrect.

30964 By Mr. Withrow:

Q. Were you a member of the advisory committee of the Chicago division of The Cement Institute, Mr. MacFarland?

A. I do not think that I was. That is my recollection.

Q. Well, do you recall whether or not you ever attended any meetings of the advisory committee?

A. I probably attended some as representing Mr. John at the time.

Q. I show you Commission's Exhibit 137-Q, and ask you if this refreshes your recollection as to attending a meeting July 22, 1930?

A. Yes, I attended that meeting representing Mr. J. B. John.

Q. Well, would you examine those minutes and tell us whether or not they correctly reflect what you recall as having taken place at that meeting?

A. My recollection is that they do.

Q. Now, at that meeting of the executive committee or the advisory committee of the Chicago division, was there any agreement entered into to allocate business or

30965 to restrict production?

A. No.

Q. Do you recall, Mr. MacFarland, whether or not there was such a committee as the executive committee of the Chicago division of The Cement Institute, or is that a misnomer for advisory committee?

A. I think it was always known as the advisory committee; that is my recollection.

Q. Now, did you serve on any committee of The Cement Institute?

A. I do not recall any.

Q. Do you recall whether you ever served on the tariff committee of The Cement Institute, say, after January 1, 1934?

A. No, I am quite sure I did not.

Q. Mr. MacFarland, I believe I neglected to ask you in connection with this Exhibit 137-A and B, whether after an examination of these minutes, the minutes correctly re-

flect what you recall as having taken place at those meetings?

A. They do.

Q. Now, Mr. MacFarland, you told us Mr. Mallory was not an employee of the Institute at the time this telegram, Commission's Exhibit 2880, was sent.

To your knowledge, did Mr. Mallory have any connection with the Institute at that time which would authorize him to send any telegrams on its behalf?

30966 A. He had no connection with it during my period as president, which was during the period from '31 until the reorganization about June, 1933.

Q. So he was not authorized?

A. No.

Q. Now, during your connection with the Institute, which you have gone through, was there any agreement or understanding or conspiracy to allocate business or restrict production, as far as you know?

A. None whatever.

Q. Mr. MacFarland, do you remember when you first met W. W. Campbell?

A. Many years ago before I came with the Medusa Company.

Q. That was prior to the year 1930, then?

A. Oh, yes.

Q. How did you come to meet him?

A. He was a building material dealer. We solicited his business during the time I was with the Atlas Company, unsuccessfully, but we tried to get it.

Q. Now, when you came with the Medusa Company in 1930 did you have any business dealings with Mr. Campbell after that?

30967 A. Oh, I met him and talked with him, tried to get his business.

Q. Do you recall who first suggested the possibility of going to the railroads on the matter, with reference to trucking of cement?

A. It was either Mr. Campbell or Mr. Holway of Youngstown. My recollection would be that it would be Mr. Holway and later Mr. Campbell.

Q. How did you happen to know Mr. Holway?

A. I have known Mr. Holway for many years, before he was really in charge there in the old days of the Atlas Company.

Q. And by "in charge there" you mean the Youngstown Ice Company?

A. Yes, the Youngstown Ice Company.

Q. Had Youngstown Ice Company been a customer of the Atlas Company?

A. For many years.

Q. And was it one of Medusa's customers?

A. A small customer.

Q. You say a small customer.

A. I mean small in point of volume.

Q. That is, from Medusa's point of view?

A. Yes.

Q. Do you know or would you say that the Youngstown Ice Company was a large handler of cement, or small?

30968 A. Oh, yes, fairly large handler.

Q. Well, could you give us any idea approximately of the volume of business he did?

A. It would be hard to say in recent years. I know in our experience with the Atlas Company he used to do forty or fifty or sixty thousand barrels a year.

Q. Do you recall the occasion of your first conversation with Mr. Holway on this matter of trucking?

A. I would not like to place the time, but I remember making a trip to Pittsburgh by automobile, stopping in Holway's office on the way down, and just in our general course of getting business he started on the question of trucking, and I guess spent two or three hours there on that, I recall very distinctly. My wife waited out in the car. We had forgotten she was there.

Q. Well, who started the conversation on trucking, was it you or Mr. Holway?

A. Holway.

30970 Q. Now, would you tell us, Mr. MacFarland, whether or not you acted upon the representations and statements made to you by Mr. Holway?

Mr. MacIntyre: Acted—you mean in continuing his trip to Pittsburgh, or doing what?

Mr. Withrow: With reference to the matter of trucking.

A. Well—humph—I think that question is a little—confusing, in other words.

Mr. MacIntyre: I think so.

By Mr. Withrow:

Q. Well, did the information which Mr. Holway gave

you, and the statements he made, play any part in any action which you took with reference to trucking?

30971 A. Yes, they did.

30977 Q. Mr. MacFarland, what interest did you, representing the Medusa Company, have in this matter of trucking?

A. Interest in getting business for the Medusa Company.

Q. Now, how did W. W. Campbell come into this picture?

A. Mr. Campbell was—

Trial Examiner Norwood: He has gone over that. How he—

Mr. Withrow: Just how he happened to know Mr. Campbell, not how—

Trial Examiner Norwood: Go ahead.

The Witness: Question, please?

30978 Trial Examiner Norwood: Read it.

(Last question read.)

A. At that time he was president of the National Builders' Supply Dealers' Association, and was, like many other dealers, very much interested in the discontinuance of trucking, because it was hurting their business.

By Mr. Withrow:

Q. Now, did Mr. Holway contact Mr. Campbell, or did you contact Mr. Campbell, or did Mr. Campbell contact you?

A. My recollection is that Mr. Holway contacted Mr. Campbell, and I had some conversations with both of them.

Q. And was that at Mr. Holway's suggestion, his contacting Mr. Campbell? Was it his idea?

A. Yes.

Q. Now, subsequently to Mr. Holway contacting Mr. Campbell, did Mr. Campbell then contact you?

A. Well, I had—yes, I had two or three meetings with Mr. Campbell. I think he came to Cleveland once or twice, as I recall it.

30979 Q. Mr. MacFarland, did any other dealers besides Mr. Holway or Mr. Campbell contact you about this matter of trucking?

A. They did; quite a number of them.

Q. And would you state briefly their attitude towards trucking? Were they complaining against it, or what?

A. Their attitude generally was that it was hurting the business.

Q. And were these persons customers of the Medusa Company?

A. Some customers, and some customers we had hoped to get.

Q. Now, would you tell us who took the first steps in contacting the railroads, you or the dealers?

A. My recollection is it was Mr. Holway. It was either Mr. Holway or Mr. Campbell.

Q. Was that at your suggestion or did Mr. Campbell and Mr. Holway do it on their own initiative?

30980 A. It would be hard for me to recollect just who did make the first recommendation, whether it was Campbell or Holway or myself.

By Mr. Withrow:

Q. Well, Mr. MacFarland, can you fix the approximate date of this conversation with Mr. Holway?

A. I would hesitate to say the approximate date, but it can be traced back to a meeting that was held with the railroads in New York, and I have forgotten just what year it was; July, I think, of some year.

Q. July of 1931?

A. Probably; I know there was such a meeting held.

Q. Well, was this meeting with Mr. Holway just prior to that meeting with the railroads?

A. Shortly prior to that, oh, probably might have
30981 been three or four months.

Q. Mr. MacFarland, I show you Commission's Exhibit 1043-A, and ask you if you ever saw that letter prior to this case?

A. I do not recall that I did.

30982 Q. Mr. MacFarland, in any of your dealings with Mr. Campbell or Mr. Holway, would you tell us whether or not you were acting as president of The Cement Institute?

A. I was not.

Q. In what capacity were you acting?

A. As vice-president of the Medusa Cement Company.

30983 Q. When you became president of The Cement Institute, Mr. MacFarland, was any unfinished business with Mr. Campbell or Mr. Holway passed on to you by the outgoing president?

A. No.

Q. To your knowledge, did the previous president have any connection with W. W. Campbell, or Mr. Holway, as far as you know?

A. Not that I know of.

Q. Mr. MacFarland, I show you Commission's Exhibit 1489, being a letter from W. W. Campbell, addressed to you, as vice-president of Medusa Company, under date of June 12, 1931, and ask you to tell me whether or not this is the first letter which you recall having received from Mr. Campbell concerning this matter of trucking (handing document to witness)?

A. That's my recollection, it is the first letter.

Q. Does that letter help you fix the date when you first talked to Mr. Holway about this matter?

A. Shortly before June 12, 1931.

Trial Examiner Norwood: Did Mr. Campbell take this matter up with The Cement Institute?

The Witness: No.

Trial Examiner Norwood: Or any of its officials, as such?

The Witness: Not that I know of.

By Mr. Withrow:

30984 Q. And you were president at this time?

A. I was president at the time.

Mr. MacIntyre: That is, president of The Cement Institute?

The Witness: Yes, I was president of The Cement Institute, but this trucking matter was always handled as vice-president of the Medusa Company.

By Mr. Withrow:

Q. And I show you, Mr. MacFarland, Commission's Exhibit 1488, being a letter written by you, as vice-president—it says "vice-president" on it—to Mr. W. W. Campbell; is that the answer to Commission's Exhibit 1489 (handing document to the witness)?

Mr. MacIntyre: Is that in evidence?

Mr. Withrow: Yes.

A. It is.

By Mr. Withrow:

Q. In what capacity did you write that letter?

A. As vice-president of the Medusa Cement Company.

Q. Now, after you wrote Commission's Exhibit 1488 in

June, 1931, will you tell us whether or not you approached Mr. Holway after that series of correspondence, or whether Mr. Holway approached you after it?

A. My recollection is that Mr. Holway approached me.

Q. Would you tell me who was to arrange the
30985 meeting referred to in Commission's Exhibit 1488?

A. Either Mr. Holway or Mr. Campbell—let me see (witness refers to document)—I would say Mr. Holway.

Q. Now, would you tell us whether or not this meeting was suggested by you or suggested by Mr. Campbell and Mr. Holway?

30986 A. It was suggested, by either Mr. Holway or Mr. Campbell—I think Mr. Holway.

By Mr. Withrow:

Q. Now, was that meeting ever held?

A. Yes.

Q. And who arranged for the meeting,—arranged the details of the meeting?

A. Well, Mr. Campbell or Mr. Holway arranged with the railroad representatives, and they arranged who were to be there for the railroad people.

Q. Now, I show you Commission's Exhibit 1479, being a letter from Mr. Campbell addressed to you as vice-president of the Medusa Company (handing document to witness); is this the letter—one of the letters by Mr. Campbell arranging that meeting?

A. (Witness studies that document.) What was the question?

(Last question read by Reporter.)

A. It is.

30987 Q. In connection with this meeting to be held in
30988 New York in July, 1931, Mr. MacFarland, did you and Mr. Holway and Mr. Campbell fly from Pittsburgh to New York to attend that meeting?

A. I did not.

Q. Do you recall having attended a meeting in New York in July, 1931, with certain railway executives and W. W. Campbell?

A. Yes.

Q. And who invited you to attend that meeting?

A. I think it was Mr. Campbell; either Mr. Campbell or Mr. Holway.

Q. Were any other cement manufacturers present?

A. There were not.

Q. Did you make any suggestion that other cement manufacturers be asked to be present?

A. I did not. I would not have been there if they had been.

Q. And why didn't you ask to have other cement manufacturers present?

A. I was trying to work out in the interest of my own company.

Q. At the time you went to the meeting would you tell us whether or not you then knew that you were to be the only cement manufacturer present?

A. That was my understanding, otherwise I would not have been there.

30989 Q. Now, I show you Commission's Exhibit 1475, being a telegram from W. W. Campbell to you as vice-president of the Medusa Company, under date of July 9, 1931. Was the meeting that is referred to in that telegram the meeting you have just been talking about?

A. It is.

Q. And is that the invitation which you received to attend the meeting in New York?

A. Yes, excepting I believe a letter followed that, confirming it.

Q. Well, is Commission's Exhibit 1472, being a letter from W. W. Campbell to you as vice-president of the Medusa Company, the letter to which you refer?

A. Yes, that is the one.

Q. Now, I show you Commission's Exhibit 1470, being a letter from Mr. Campbell to you, addressed to you as vice-president of the Medusa Company. Do you recall receiving that letter?

A. I do not recall offhand receiving it, but I know the meeting was held at the Commodore at that time.

30990 Q. Well, I direct your attention to the note in the lower lefthand corner, Mr. MacFarland, and ask you if that refreshes your recollection about that letter, Exhibit 1470?

A. It refreshes my recollection as to the purpose of the meeting, and as to what my attitude would be.

Q. Well, Mr. MacFarland, before attending the
30991 meeting, would you tell us what you understand your position was to be at the meeting?

A. Yes, I discussed the question with both Holway and Campbell at different talks I had with them, and told them that I felt that with the trucking situation as it was, being on an unsound basis, the railroads could get in and practically meet that unsound situation if they would be willing to reduce their rates for short-haul distances and increase their minimum carloadings.

Q. Well, in taking this position, will you tell us whether or not you were representing all the manufacturers or only the Medusa Company?

A. I was only representing the Medusa Company.

Q. Mr. MacFarland, I show you Commission's Exhibit 1043-2-A, and ask you if these purport to be extracts from a memorandum of conference of trunk line traffic executives, and ask you if that is the meeting which you have been referring to?

A. That has reference to that meeting, yes.

Q. Now, would you tell me whether you were asked to express Medusa's attitude at this meeting on the question of short-haul rates?

A. Yes, I think I testified to that in the previous question.

Q. Now, at this meeting of July 22, 1931, Mr. MacFarland, would you tell us whether or not you discussed or mentioned the question of putting on a 15-cent charge 30992 at the mill in order to discourage trucking?

A. I have no recollection of any discussion of that kind.

Q. Now, would you tell us whether or not at this meeting you told the railroad executives that you would make any effort, whatsoever, to get your competitors in the cement business to agree to discontinue trucking?

A. I did not.

By Mr. Withrow:

Q. Did you make any effort after this meeting?

A. No.

Q. Now, if you will look again at Commission's Exhibit 1043-2-A, Mr. MacFarland, I direct your attention to the third paragraph, third full paragraph, where it says "it was stated various things."

Now, would you tell us if you can recall whether you made those statements, or whether Mr. Holway made them, or whether Mr. Campbell made them or whether one of the

railroad executives made them?

30993 A. I cannot recall any statements of that kind being made.

By Mr. Withrow:

Q. Well, do you know whether or not you made them?

A. I am sure I didn't make them.

Q. Now, I ask you to look at the next-to-the-last full paragraph on that Commission's Exhibit 1043-2-A, and ask you whether or not it was you who requested the cooperation of the railroads, or whether it was Mr. Holway or Mr. Campbell?

30995 A. (Witness continues to study exhibit.) My recollection is that if that thing was taken up in that shape it was either Mr. Holway or Mr. Campbell that agreed to their cooperation; this—

By Mr. Withrow:

Q. Did you make such a request?

A. No.

Q. Do you have any recollection as to whether or not that request was made while you were at the conference?

30996 A. I don't recall any such request.

30998 Q. Mr. MacFarland, were you present after this conference on July 22, 1931, when arrangements were made for individual conference by the railroads with other cement manufacturers concerning trucking?

A. I was not.

Q. Was any decision reached at that meeting, that conference, that individual railroads should contact other manufacturers, while you were present?

A. Not to my knowledge, not while I was present.

Q. Were you ever sent minutes of this conference?

A. Never saw them.

Q. I show you Commission's Exhibit 1455, and ask you if that is a letter which you wrote?

A. It is.

Q. And in what capacity did you write it?

A. As vice-president of the Medusa Portland Cement Company.

31000 Q. Mr. MacFarland, would you look at the second paragraph of Commission's Exhibit 1455, where you state that you had some very definite thoughts about it and believed you knew a practical way in which a move-

ment could be started, and tell us what you meant by that at the time that you wrote the letter?

A. Well, at that time the whole trucking situation, the lack of regulation, and the unsatisfactory method of handling it, was a matter of public comment, not only in this paper but in a number of others. About that time Texas created a regulation for trucks, and my ideas were that if we could create some kind of a public sentiment by proper propaganda to get the trucks regulated so that they would be on as stable basis as the railroads it would not only be good for the cement industry but for many other industries.

Q. By "regulation," state or federal regulation?

A. State or federal regulation.

31001 Q. Were you ever contacted by a representative of the Nickelplate Railroad concerning the question of short-haul rates?

A. No.

Q. I show you Commission's Exhibit 1043-2-E and 2-F, and ask you if you ever saw this document before this case started?

A. I have no recollection of it.

Q. Well, will you look on page 2-F and tell me whether that refreshes your recollection as to whether you were contacted by the Nickelplate Railroad?

31002 A. My recollection is that I was never contacted by them.

31003 Q. I show you Commission's Exhibit 1456, and ask you if that is a letter which you prepared.

A. It was.

Q. And in what capacity, Mr. MacFarland?

A. As vice-president of the Medusa Portland Cement Company.

31004 Q. Now, after this conference that you have testified about on July 22, 1931, did Mr. Campbell ever—did he come to your office to talk to you about this matter further?

A. My recollection is that some time later he did, probably, oh, I should imagine two or three months later.

Q. And do you recall what took place when he came to call on you in Cleveland?

A. Well, if that is the particular time, the later meeting was going to be arranged with the railroads in Philadelphia, it seems to me that was several months later.

Q. Well, I show you Commission's Exhibit 1466, and ask you if this is a letter written by you?

A. Yes, it was.

Q. And in what capacity did you write the letter?

A. As vice-president of the Medusa Portland Cement Company.

Q. And would you examine that letter and tell me if it refreshes your recollection as to the date when Mr. Campbell came to see you?

31006 A. It does.

By Mr. Withrow:

Q. Well, what was the date?

A. August 4, 1931.

Q. Was that the conference that you were testifying about just a moment ago, before I called that letter to your attention?

31007 A. No, my recollection then was a later conference—was when a later meeting was to be arranged in Philadelphia, but this refreshes it back to the point of suggesting a publicity campaign be carried on.

Q. Now, that letter is addressed to a Mr. Boynton, C. H. Boynton. Would you tell me who Mr. Boynton was, Mr. MacFarland?

A. Mr. Boynton was a man who had been in charge of the old Cement Information Bureau. He later on went on with the—went over with the New York Air Brake Company, to do some publicity work.

Q. Well, why were you writing to Mr. Boynton about this matter?

A. He was naturally interested in the development of railroad business which would create more air brakes for his company.

Q. Now, there is some evidence—some evidence from which an inference can be drawn—that during late 1931 and early 1932 various railroad executives went around and interviewed various cement companies about their opinion on short-haul rates.

Would you tell us whether or not you had anything 31008 to do with those interviews?

A. I did not, any more than the interviews that I had had before.

Q. Well, did you know at that time that the railroads were going around making these interviews?

A. I would say not to any direct knowledge; maybe a little common gossip.

Q. Well, would you tell us whether or not you went in conjunction with any executive of the railroad to call on a cement manufacturer about short-haul rates?

A. No, I never did.

Q. Well, did you ever, you alone, call on any cement manufacturer and ask him to discuss this matter with the railroads and take up the matter of trucking with the railroads?

A. No.

31009 The witness identified Resp. Ex. 2181 as a letter he received; Com. Ex. 1466 is a reply to Resp. Ex. 2181.

31012 (RESP. EX. 2181, was offered and received in evidence.)

Q. Mr. MacFarland, I show you Commission's Exhibit 1466, and ask you to tell us what the plans were that are referred to in the last paragraph of that letter of yours:

A. The same plan that I testified to before, to
31013 create some public sentiment for regulating truck traffic on a reasonable regulatory basis.

Q. Now, Mr. MacFarland, do you recall whether or not you were informed at this time—that is, around August, September, 1931, that the railroads held certain meetings among themselves concerning this short-haul rate problem?

A. No, I was not informed of that.

Q. Did you attend any meetings when it was—

A. I did not.

Q. There is some evidence in the record, Mr. MacFarland, as to the existence of a meeting of the railroads in Chicago on August 29th, or August 30, 1931, concerning short-haul rates. Did you attend that meeting?

A. I did not.

Q. And there is some reference to some cement manufacturer having prepared a report to be used at that meeting. Would you tell us whether or not you prepared a report to be used at any such meeting?

A. No, I didn't prepare any report.

Q. Do you know who did, or if anyone—

A. No, I don't.

Q. —was in fact prepared?

A. I don't know.

Q. Now, when Mr. Campbell called on you in Cleveland on August 5, 1931, was any representative of any
31014 other cement manufacturer present at that discussion?

A. No, no.

Q. Now, Mr. MacFarland, there is some evidence in this record also about a meeting in Chicago around November 17, 18, and 19, which was attended by dealers and railroad officials on the matter of trucking. Did you attend that meeting?

A. I did not.

Q. Were you asked to attend that meeting, do you recall?

A. I don't recall ever being asked to attend it.

Q. Mr. MacFarland, I show you Commission's Exhibit 1461, and ask you if you prepared that letter (handing document to witness)?

A. I did.

Q. In what capacity did you write that letter?

A. As vice-president of the Medusa Portland Cement Company.

Q. Now, I direct your attention to the last sentence in the last paragraph of that letter, Mr. MacFarland, and will you tell us whether or not that reference there is to your conversation with Mr. Campbell in Cleveland in August of 1931 (handing document to witness)?

A. (Witness studies document.) What is the question?

(Last question read.)

Mr. MacIntyre: Just a moment.

I just want to observe that the questioning is slightly
31015 leading. He could ask him what it did refer to, and let him explain what it refers to, rather than suggesting.

Trial Examiner Norwood: He is putting the answer in his mouth.

I will sustain the objection.

By Mr. Withrow:

Q. I direct your attention to that last sentence in the last paragraph, and just tell me, Mr. MacFarland, if you recall what that refers to.

A. It refers to the same situation that we have discussed here in the last three or four questions about working out some plan of trying to get enough public interest to get trucking regulated.

Q. Well, what conversation with W. W. Campbell does that refer to? Can you fix that?

A. The one early in August of that year, I think it was the 4th of August.

Q. I show you Commission's Exhibit 1465, and ask you if you wrote that letter (handing document to witness)?

A. I did.

Q. In what capacity did you write it, Mr. MacFarland?

31016 A. As vice-president of the Medusa Portland Cement Company.

The witness identified Resp. Ex. 2182 as the enclosure referred to in the first paragraph of Com. Ex. 1465.

(RESP. EX. 2182 was offered and received in evidence.)

Q. Mr. MacFarland, I show you Commission's Exhibit 1353, and ask you if you ever saw this letter prior to

31017 the commencement of this case (handing document to witness)?

A. No, I did not.

Q. Did you know, Mr. MacFarland, in September, 1931, that Mr. Campbell was submitting to the Pennsylvania Railroad a list of companies, the Lehigh Company, the West Penn Company, the Medusa Company, the Bessemer Company, the Columbia Company, and the Northwestern Company, and characterizing them as being favorable?

A. I didn't—no.

31020 Q. Well, Mr. MacFarland, did you attend a meeting in Cleveland on November 27 or 28 in 1931 attended by both dealers and cement manufacturers at which trucking and short-haul rates were discussed?

A. No.

Q. Did you take any part in arranging for such a meeting?

A. No.

Q. Were you asked to attend such a meeting?

A. Not that I ever recall.

Q. Now, I show you Commission's Exhibit 1458, and ask you if you wrote that letter?

A. I did.

Q. And in what capacity did you write that letter?

A. As vice-president of the Medusa Portland Cement Company.

Q. Now, in that exhibit there is a list referred to in the

first paragraph. Would you tell us what that list was,—do you recall?

A. According to my recollection that is a list of a poll of a number of the dealers in the State of Ohio that
31021 Mr. Kinney had made giving their thoughts as to the trucking situation.

Q. Well, would you tell us what the recent action was which is referred to in the first paragraph?

A. Well, that is covered by the other answer.

Q. That was the taking of the poll?

A. The taking of the poll.

Q. Mr. MacFarland, do you know what this poll showed?

A. Practically all the dealers that had answered the poll were very much against the trucking of cement and other building materials.

Q. I show you, Mr. MacFarland, Commission's Exhibit 1043-4-I, which purports to be a letter from the Ohio Builders Supply Association addressed to you at the Medusa Portland Cement; did you receive that letter?

Mr. MacIntyre: What is the number of it?

Mr. Withrow: 1043-4-I.

A. Yes, I recall receiving it.

By Mr. Withrow:

Q. Now, there is a reference in the first paragraph to a bundle of letters. Would you tell us what that bundle of letters was, if you recall?

A. My recollection is that it was a bundle of letters from various dealers telling about their thoughts in regard to trucking.

Q. Were any of those letters from dealers who
31022 purchased Medusa cement?

A. Some from dealers who purchased from Medusa, some from those that we had hoped to sell.

Q. And going back to this poll you referred to a couple of minutes ago, were any of the dealers who contributed to that poll purchasers of Medusa cement?

A. Some were.

Q. And were any of them people who you were soliciting but could not sell?

A. We hoped to sell all of them if we could.

Q. Now, Mr. MacFarland, I show you Commission's Exhibit 1814-A, B, and C, and ask you if this is a letter, copy of a letter which you received?

A. It is.

Q. From whom did you receive that letter?

A. Mr. Vanderwerp, vice-president of the Medusa Portland Cement Company.

Q. Now, was the Medusa Company ever able to get the reduction in short-haul rates referred to and suggested in that letter, 1814-A to C?

A. They were not.

Q. And what was the reason for your discussing, or an exchange of correspondence between you and Mr. Vanderwerp on this subject?

A. Well, we had both talked over the question of
31023 getting the lower short-haul rate with higher loadings, maximum loadings for the care from the Railroads, figuring that that would be beneficial not only to our business but enable the railroads, to compete with the trucks.

Q. Now, Mr. MacFarland, do you recall attending a meeting in Philadelphia in January of 1932?

A. With the railroads?

Q. Yes, with the railroads.

A. There was a meeting, and I think that was the date, that was the meeting at the Ben Franklin Hotel, I believe.

Q. Now, during this interim between July, 1931, and January, 1932, these two conferences, had you made any efforts whatsoever to interest any other cement manufacturers in this matter?

A. No, I had not.

Q. You have already testified that there were no meetings of the Institute during this period. Would you tell me, now, whether or not you made any oral or written reports to any of the members of the Institute about these negotiations or conferences you had with Mr. Campbell and the railroads?

A. None whatever.

Q. Would you recall what happened at this meeting with the railroads on July 7, 1932?

A. At that meeting there was the same discussion that there was at the New York meeting seven or eight months
before that regarding trying to get the railroads to
31024 see the advisability of lowering the short-haul rates.

Q. Now, were the short-haul rates ever reduced after that?

A. Never, never.

Q. Now, do you know who invited you to this meeting?

A. Either Mr. Holway or Mr. Campbell or both.

Q. And when they invited you did they tell you they were inviting you because you were president of The Cement Institute?

A. No.

Trial Examiner Norwood: Did they know you were president?

The Witness: Oh, naturally, they knew I was president, but knew that I was acting for the Medusa Company.

By Mr. Withrow:

Q. Well, when you attended this meeting were you representing The Cement Institute or were you representing the Medusa Company?

A. Representing the Medusa Company.

Q. I show you Commission's Exhibit 1043-4-S through 4-U, which purport to be minutes of this meeting, and I will ask you if you ever saw these minutes before the beginning of this case in July, 1937?

A. No, I have no recollection of seeing them.

Q. Now, will you tell us whether or not at this conference you were asked to tell what Medusa's position was in this matter?

31025 A. Well, I cannot say definitely whether I was asked or not. I did state what our position was, that we felt that if we could get those short-haul rates lowered that it would be very beneficial.

Q. Mr. MacFarland, do you recall if about that time the Medusa Company put an additional charge on cement to be delivered by trucks?

A. I don't recall that.

Q. Do you recall whether Medusa ever had such an additional charge?

A. I wouldn't want to testify to that from a matter of knowledge; I could get the record, if you want it.

Q. Will you tell me whether or not at this meeting, this conference of January 7, 1932, any agreement was entered into with the railroads, or the dealers, that you would discontinue trucking?

A. We never entered into any such agreement.

Q. Now, you have testified previously that there were no meetings of The Cement Institute in 1932. Did you make

any oral or written reports to any officers or members of the Institute concerning the matters discussed at this meeting of January 7, 1932?

A. No.

Q. Or any oral or written report to any officers or members of the Institute concerning the meeting, in any
31026 respect whatsoever?

A. None whatever.

Q. Now, what action did you take with reference to this matter after the meeting of January 7, 1932?

A. I didn't take any special action, wanted to wait and see what the railroads were going to do.

Q. And what, if any, action, did the railroads take?

A. They had taken none.

Q. What, if any, action did Mr. Campbell or Mr. Holway take?

A. I couldn't tell you.

Q. I mean, if you know.

A. I don't know.

Q. Well, would you tell us whether or not that was the last conference you attended with the dealers and railroads on this matter?

A. Yes, I don't recall of any conference after that.

Q. Did you enter into any agreement with your competitors concerning the matters discussed at that meeting of January 7, 1932?

A. None whatever.

Q. Now, Commission's Exhibit 1644-A and B,—I think that is also Exhibit 1043-5-C and 5-D,—refers to a meeting at Chicago in April of 1932 called by Morris of the Central Freight Association.

Did you attend that meeting?

31027 A. I did not.

Q. Did you ever attend any meeting with traffic managers of your competitors on this matter of short-haul rates?

A. No.

Q. After this meeting, this conference, you have talked about, on January 7, 1932, did you ever attend any meetings with dealers or dealer associations concerning the matter of discontinuing trucking?

A. None to my recollection.

Q. Now, I show you Commission's Exhibit 1613, Mr.

MacFarland, and ask you if you ever saw that letter before this case started (handing document to witness)?

A. No.

Q. The first paragraph of that letter, Mr. MacFarland, refers to a conversation between you and Mr. Meyer, of the Green Bag Cement Company of Pennsylvania.

Do you recall that conversation?

A. I don't reeall that now.

31028 Q. Did you at any time, in any conversation, enter into any agreement with any of your competitors with reference to the discontinuing of trucking?

A. I did not.

Q. Now, have any individual dealers continued to discuss this problem of trucking with you since this meeting of January, 1932?

A. Oh, I would say they had, yes, since that time, up to about the time I ceased activities in the grey cement business; we were all interested in it.

Q. Mr. MacFarland, there is some evidence in the record to the effect that the Medusa Company discontinued trucking or limited trucking at its Wampum mill in December, 1931. Would you tell us what were the circumstances surrounding that?

A. I am not familiar with that; that was handled—must have been handled by the president or the sales manager.

31029 Q. Now, there is some evidence in the record of an agreement among the manufacturers to discontinue trucking in and around Ohio, in December, 1931.

Do you know of any such agreement?

A. I don't know of any agreement.

Q. Were you a party to any such agreement?

Trial Examiner Norwood: Now, he said he was not a party to any agreement with anybody. That is all inclusive.

31033 By Mr. Withrow:

Q. Mr. MacFarland, did you have any conversations with Mr. Cole on this question of short-haul rates?

A. I did.

Q. And who is Mr. Cole?

A. Traffic manager of the Medusa Portland Cement Company.

Q. Did you keep in touch with his activities?

A. Only in a general way.

Q. To your knowledge, did Mr. Cole enter into any agreements to discontinue trucking?

A. Not to my knowledge.

Q. And what were Mr. Cole's activities, in a general way?

Mr. MacIntyre: Now, just a second. If that goes only to the witness' knowledge of them rather than attempting now to say what they were, whether he knew about them or not, is something else.

Trial Examiner Norwood: You may tell us what he was—what it was his official duty to do in connection with The Cement Institute while the witness was present; he can tell that. He can tell anything about Mr. Cole's activities that he has firsthand knowledge of.

Mr. Withrow: Well, I take back that question.

By Mr. Withrow:

Q. Did Mr. Cole have anything to do with The Cement Institute?

31034 A. No.

Q. Tell us what you know about Mr. Cole's activities in this general matter?

A. Well, Mr. Cole knew of what I had done in these meetings with the railroads, and Mr. Holway and Mr. Campbell, and he knew what the attitude of the company was regarding the short-haul rates, and he was to follow up the details.

Trial Examiner Norwood: Now, who was Mr. Cole?

The Witness: Our general traffic manager, Medusa Portland Cement Company traffic manager.

By Mr. Withrow:

Q. Would you tell us whether or not, to your knowledge, his duties were anything more than an attempt to secure short-haul rates?

A. Well, in connection with this matter his duties were nothing more than that; of course, his general duties as traffic manager varied.

Q. Now, Mr. MacFarland, what were Medusa's interests in these activities which you described which you carried on, and which Mr. Cole carried on?

A. Customers' good will, to put it shortly.

Q. Mr. MacFarland, were you present, or do you recall whether or not you were present at a meeting of the board

of directors of the National Federation of Builders'
31035 Supply Associations held in Kansas City in June of 1935?

A. I think I was; my recollection is that I was.

Q. And in what capacity did you attend that meeting?

A. As officer of the Medusa Portland Cement Company.

Q. And why did you attend the meeting?

A. Oh, it was a meeting of dealers and customers, and I was there for the purpose of creating good will and getting business.

Q. Did you take any part in the deliberations in this meeting?

A. None whatever; as I remember it, I think I introduced the speaker of the evening, and that is the only part I took in it.

Q. Well, was this introduction of the speaker planned in advance? Did you go there for that purpose?

A. No, no, it was—it came out of a clear sky that afternoon.

Q. And do you recall who this speaker of the evening was on that occasion?

A. It was Mr. Mehren, president of the Portland Cement Association.

Q. And you were acquainted with Mr. Mehren?

A. Yes, indeed.

31037 Washington, D. C.,
January 23, 1940.

31041 DAVID H. MacFARLAND thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow (Continued).

Q. Mr. MacFarland, on record page 30943 there is a statement by you as follows—

Mr. MacFarland: What is the page on that, please?

Mr. Withrow: 30943.

By Mr. Withrow:

Q. Well, the question is this: "Why did you resign as president?"

And your answer was: "Because my duties I had

figured had been completed. I had simply accepted the presidency during the period from 1921—or '31 to 1933" —and then goes on.

Would you tell us which date you intended, 1921 or 1931?

A. 1931.

Q. Now, you testified, Mr. MacFarland, about two conferences with railroads and dealers, one in New York and one in Philadelphia. Were those the only such conferences that you attended?

A. They were.

Q. Now, on record page 31008, in answer to the
31042 question which began on the preceding page, which reads as follows:

"Q. Now, there is some evidence—some evidence from which an inference can be drawn—that during late 1931 and early 1932 various railroad executives went around and interviewed various cement companies about their opinion on short-haul rates.

"Would you tell us whether or not you had anything to do with those interviews?"

And your answer is as follows—

Q. (Reading):

"A. I did not, any more than the interviews that I had had before."

31043 Now, I would like to know, Mr. MacFarland, what you meant by interviews in that connection?

A. The interviews at the meetings in New York and Philadelphia with the railroads.

Q. That is those two conferences I just asked you about?

A. Those two conferences.

Q. Had nothing to do—or would you sell us whether or not it had anything to do with any interviews between railroad executives and other cement companies?

A. None whatever.

Cross-Examination by Mr. MacIntyre.

Q. Mr. MacFarland, at page 31028, line 8, of the record, Mr. Withrow asked you a question as to whether or not you had any agreements at any time with any of your competitors concerning trucking and the like.

Do you recall that?

A. I do.

Q. I am going to ask you another question on that
31044 line, Mr. MacFarland. I am going to ask you whether or not that you have at any time had any agreements, understandings, meetings, conversations, communications, or discussions with representatives of competitors of your company relative to any matter, including trucking, that related to f.o.b. mill or f.o.b. destination prices?

A. It seems to me that question is too broad to answer in one answer.

By Mr. MacIntyre:

Q. Well answer it any way you can, Mr. MacFarland,
31045 with any limitations, modifications, or in any way that you feel that it meets the facts as you know them.

Trial Examiner Norwood: Have you had any discussion on those subjects?—

The Witness: No.

Trial Examiner Norwood: —stated in the question?

The Witness: I have no agreements, understandings, or any meetings in connection with these matters. I wouldn't say that at different times with individuals of companies I had not talked about our general conditions of business which might have included trucking or other matters; but never, in any way, have I had any meetings or understandings or agreements with any of my competitors regarding it.

By Mr. MacIntyre:

Q. What about your communications, conversations with them, concerning these trade practices including trucking?

Mr. Withrow: Your Honor, he has just answered that question.

Trial Examiner Norwood: It is overruled.

Mr. Withrow: It is beyond the scope of the direct examination.

Trial Examiner Norwood: The objection is overruled.

The Witness: What is the question, please?

Trial Examiner Norwood: Read it.

31046 (Last question read by Reporter.)

A. I know of no communications. I don't know what you mean by "what about conversations."

By Mr. MacIntyre:

Q. Well, group meetings at which conversations were carried on between you and your competitors.

A. I haven't had any such group meetings.

Q. Concerning any trade practices that related to f.o.b. mill prices or f.o.b. destination prices?

Mr. Withrow: Your Honor, I object to that question; it is beyond the scope of the direct examination; it is repetition.

Trial Examiner Norwood: I do not see how Counsel can contend that that is beyond the scope of your direct examination.

Mr. Withrow: Well, I would like Counsel for the Commission to point out one place where this witness was asked one single question about f.o.b. mill sales, about whether he sold on a delivered-price basis, or anything else.

Trial Examiner Norwood: You asked him about agreements.

Mr. Withrow: I asked him only on one subject.

Trial Examiner Norwood: Yes.

Mr. Withrow: And the question I have before me, 31047 which Mr. MacIntyre misquoted, is this:

"Did you at any time in any conversation enter into any agreement with any of your competitors with reference to the discontinuing of trucking?"

Trial Examiner Norwood: Yes.

Mr. Withrow: And that is a very limited question, and does not call for broad cross-examination. It has nothing to do with f.o.b. mill; it has nothing to do with trade practices; it has only to do with the discontinuance of trucking.

Trial Examiner Norwood: It calls for further explanation, if the Counsel for the Commission wants to ask for it—plainly within the field of proper cross-examination of this witness.

Now, the objection is overruled.

Mr. Withrow: But, Your Honor, I would like to say one more thing.

Trial Examiner Norwood: Please—please—for the record,—I do not think there is any use of discussing it further; if there is any doubt about it we might discuss it.

Proceed.

By Mr. MacIntyre:

Q Please—

Mr. Withrow (interposing): Before you proceed

31048 I would like to note an exception for being put off the record at this time in the course of making a legal exception.

Trial Examiner Norwood: Counsel already knows that he has an exception to every adverse ruling.

Go ahead.

Read the question.

(Last question read by Reporter.)

A. During the period under which I have been examined I have had no such conversations or meetings.

By Mr. MacIntyre:

Q. Well, now, if you please, Mr. MacFarland, we don't want to limit this just to a few months. We want to know whether or not you had any outside of this particular short period that was selected by your Counsel. We want to know what about other periods. Give us all that you can concerning the facts in that period, or outside of it. He specified no time with respect to his question that I have just called to your attention.

Mr. Withrow: Could I have the question read, Your Honor? I don't think there is one.

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

Trial Examiner Norwood: Answer the question.

Mr. Withrow: Your Honor, I want to object.

31049 There is no question there. It refers to "this" without defining what he means by "this." I think Counsel for the Commission can ask a question which is a proper question.

Trial Examiner Norwood: It is a perfectly clear question.

The objection is overruled.

Answer the question.

The Witness: What is the question, please?

(Question read by Reporter.)

A. I have had no understandings or agreements whatever at any time during my period in the cement industry. My period, as you know, runs back to 1908, and if I would undertake to say that I had had no discussion with my competitors individually at different times, it would be a very hard thing for me to deny. At the same time I have never had any understandings or agreements with them in any way whatever.

By Mr. MacIntyre:

Q. That is, you haven't had—is it your testimony you haven't had any understandings or agreements with any of your competitors concerning any trade practices that they or your company were to adopt since your have been in the cement industry?

Mr. Withrow: Your Honor, could I have my objection to this whole line of questioning as being beyond the scope of the direct examination?

31050 Trial Examiner Norwood: Yes.

Mr. MacIntyre: Please read the question.

(Question read by Reporter.)

A. I have not had any understanding. I have been present and agreed to certain recommended practices, but never any agreement to put them in effect.

By Mr. MacIntyre:

Q. But you have met with your competitors and agreed upon recommendations as to the adoption of various trade practices?

A. As per the record in The Cement Institute.

Q. I do not understand.

A. As per the record in The Cement Institute.

Q. And as to matters not shown by the records of The Cement Institute?

A. None whatever.

Q. Mr. MacFarland, weren't you a member of the Trade Conditions Committee of the Association, of American Portland Cement Manufacturers at the time you were with the Atlas Portland Cement Company?

A. Oh, yes. I should have covered the question by the —what had been done in the Portland Cement Association as well as The Cement Institute.

Q. That is the Portland Cement Association at the time it was known as Association of American Portland Cement Manufacturers?

31051 A. I have forgotten during what period that was.

Q. Well, I call your attention to Commission's Exhibit 3193, and call your attention to the page of the personnel of its Trade Conditions Committee. Weren't you a member of that committee?

A. I was.

Q. At that time representing the Atlas Portland Cement Company?

A. Yes.

Q. And at that time Mr. B. F. Affleck, of the Universal Company, was vice-chairman of the committee?

A. Right.

Mr. Withrow: Your Honor, I object to this line of questioning. This matter was gone into in the Old Cement case. We all know what the Supreme Court decided in that case. I do not think that we should broaden the issue in this case to include the issue in that case.

Trial Examiner Norwood: The objection is overruled.

By Mr. MacIntyre:

Q. Showing you Exhibit 3194, is that Mr. William Kinney's signature there of the Portland Cement Association as you recall it?

A. It looks to me as though it had been signed by a secretary.

Q. For him?

31052 A. Signed in his name.

Q. Well, now, do you recall after refreshing your memory and recollection from those exhibits that you were on a trade conditions committee of the Association of American Portland. Cement Manufacturers, which is now known as the Portland Cement Association, and in that connection you discussed and agreed upon recommendations with your competitors as to certain trade practices?

A. I do not like you to put the answer in my mouth. I did not agree with my competitors as to certain trade practices. I was on the committee thta recommended certain trade practices, and they never became effective in the industry as a whole.

Q. Well, at that time you did agree with your competitors to make the recommendations, didn't you, as to these trade practices to the industry?

A. I agreed that the recommendations were proper recommendations for those who wished to follow them.

Q. That is, you agreed with your competitors that they were the proper recommendations for the people to follow if they cared to so follow them; is that correct?

A. I would not say so.

Q. Well, what is correct in that respect, Mr. MacFarland?

A. I think we, as a committee, lined up certain trade practices that we though were ideal as recommenda-

31053 tory to the industry. There has never been any thought in the minds of myself, and, I think none

in the minds of any of the other members of the committee that these practices were ever compulsory or agreed upon.

Q. Now, you subsequently served upon the trade practices committee of the same Association after it became known as the Portland Cement Association in 1919, didn't you, Mr. MacFarland?

A. I did.

Mr. Withrow: What exhibit are you showing to the witness?

Mr. MacIntyre: Commission's Exhibit 3192.

By Mr. MacIntyre:

Q. Do you recognize the list of the personnel of that committee and your membership in it as a representative of the Atlas as of that time?

A. Yes.

Q. At the time that you were representing the Atlas Company who was its president?

A. What was the date?

Q. Well, the 1915 date, the first.

A. John R. Morron.

Q. What?

A. John R. Morron.

Q. He was president?

31054 A. He was president.

Q. Who represented the Universal Company at that time as president?

A. I think it was B. F. Affleck.

Q. It was not Mr. Hagar?

A. No. Just let me correct that now. I am not sure of the dates when Mr. Hagar resigned and Mr. Affleck came in. My recollection is that Mr. Affleck was president at the time.

Q. You do know Mr. E. M. Hagar, as—or did know him as president of the Universal, didn't you?

A. I did.

Q. Didn't Mr. Morron, your president of the Atlas Company, take you to task on one occasion, Mr. MacFarland, for having attended one of these meetings at which a record of its proceedings was made disclosing some discussion on trade practices? He said he did not care for that to be published, it might give a wrong impression of the cement industry if it became known?

A. Never to my recollection.

Q. You do not recall that?
A. I do not.
Q. Wasn't that in connection with the meeting that you attended with Mr. F. M. Coogan in the Raleigh Hotel during November, 1915, here in Washington?
A. I do not recall it.
31055 Q. You do recall having, just a few months after that, January, 1916, attended the organization meeting of the Cement Manufacturers Protective Association, don't you?
A. I have forgotten the date when it was organized. I believe I attended it.
Q. The organization meeting?
A. Yes.
Q. And you also attended the organization meeting of the sales managers branch of that Association during January, 1916, didn't you?
A. I have forgotten that. If you have the record, it is there, but I have forgotten it.
Q. I will show you a document which was marked as Government Exhibit 120 in the Old Cement Manufacturers Protective Association case, Mr. MacFarland, and ask you if that refreshes your recollection—refreshes your memory and recollection as to your attendance at the organization meeting of the sales managers branch of the Cement Manufacturers Protective Association in Philadelphia on January 31, 1916?
Mr. Withrow: What exhibit number is that, Mr. MacIntyre?
Mr. MacIntyre: It has not been marked for identification in this case, but I have identified it so that it can be referred to.
Mr. Withrow: I do not think that is proper pro-
31056 cedure. I ask to have it marked.
Mr. MacIntyre: I have no objection. We can have it marked.
Trial Examiner Norwood: You had better mark it.
Mr. MacIntyre: I thought I would just save that much time.
Trial Examiner Norwood: Off the record.
(There was a discussion off the record.)
Trial Examiner Norwood: On the record.
Mark that as Commission's Exhibit 3241, and describe it as a bound booklet consisting of 51 numbered pages.

(The booklet, consisting of 51 pages, above referred to, was marked for identification "Commission's Exhibit 3241.")

Trial Examiner Norwood: Please read the question.

(Last question read.)

Mr. Withrow: Your Honor, I object to the question, it now appearing that Mr. MacIntyre is examining the witness about the contents of a document not in evidence; also, I object to the question on the ground that it is beyond the scope of the direct examination. It is an attempt to retry the Old Cement case. I think the issues may be broad here but they are not that broad, and for all those reasons we object to that question.

31057 Trial Examiner Norwood: As I understand it, this is only for the purpose of testing this witness' statement as to not agreeing. It is not to prove any factual statements in this case, but merely offered to refresh his recollection. I think it is a paper that he may use for that purpose.

Mr. Withrow: But the question quotes from an exhibit not in evidence. Perhaps a proper question could be based on that document.

Trial Examiner Norwood: No, he has not based any questions on it except the question as to whether or not it refreshed his recollection.

The objection is overruled.

Let the record show that that is marked for identification as Commission's Exhibit 3241.

Answer the question.

The Witness: What is the question?

Trial Examiner Norwood: Read it.

(Question read.)

A. The record shows that I was there but it is an awful long time to ask me to remember.

By Mr. MacIntyre:

Q. Do you recall others that were there in attendance with you at that sales managers branch meeting?

A. According to the record.

Q. Well, tell us what you know about it.

31058 Mr. Withrow: Your Honor, he has testified he had no recollection. All he could see was what was in the record. I think the question is improper and we are wasting time.

Trial Examiner Norwood: Well, do you deny that you were at those meetings?

The Witness: Oh, oh. No. I do not deny it. I probably was there.

By Mr. MacIntyre:

Q. Tell us who were the others present at that meeting, if you can, and who they represented—that is, what companies?

31060 A. I could only tell you by reading from the record of the minutes.

Trial Examiner Norwood: Well, you read the record and then if you have any recollection of it you tell us so, and if you have no recollection you tell us so; if you have a partial recollection you tell us that.

The Witness: Your Honor—

Trial Examiner Norwood: Read from the paper.

The Witness: Yes.

Your Honor, I testified that I had no recollection of what occurred at that meeting.

Trial Examiner Norwood: Yes. Not any whatsoever?

The Witness: None whatsoever.

By Mr. MacIntyre:

Q. You do recall having attended such meetings?

A. Only in—Oh, I have attended the meetings, yes, in connection with The Cement Institute, of course.

Q. Well, the Cement Manufacturers Protective Association,—you also attended those meetings?

31061 A. Of course.

Q. And the organization meetings?

A. Yes.

Q. Sales managers branch—the general meetings?

A. I probably attended most of the meetings of The Cement Manufacturers Protective Association.

Q. Now, can you tell me as to some of the people who were present at those meetings?

Mr. Withrow: Your Honor, I object. It is perfectly all right—

Trial Examiner Norwood: Overruled.

Mr. Withrow: —to ask who attended the specific meeting, but to ask for general testimony, who attended meetings which occurred over a period starting in 1916 up to the present day, I do not think that is a proper question.

Trial Examiner Norwood: Now, there is no point whatsoever to Counsel's objection. Please.

The objection is overruled.

The Witness: What is the question?

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. Not the different meetings; different members of the Cement Manufacturers Protective Association.

By Mr. MacIntyre:

31062 Q. Well, we are talking about the organization meeting of January, 1916, now, Mr. MacFarland.

A. I couldn't tell you from my recollection who were present at the organization meeting.

Q. Well, do you recall that Mr. J. F. Twamley, the man who now is with the Coplay Company, and who at that time was with the Bath Portland Cement Company, as to whether he was present?

A. I couldn't recall.

Q. Could you tell me about Mr. Marion S. Ackerman of the Lawrence Portland Cement Comapny, Marion S. Ackerman? Was he present?

A. I couldn't recall.

Q. Mr. Bert L. Swett of the Lehigh Company, can you recall whether he was present?

A. I couldn't recall.

You are asking me about a meeting back in 1916 that you have a record of. I wouldn't want to say now. There have been a number of Cement Manufacturers' Protective meetings in which different men have been present at different times, and I would be perjuring myself if I tried to recall who were present at each one of the different meetings.

Q. Well, we are talking about the organization meeting now, the first one.

A. Well—

31063 Q. I did not understand you.

A. I couldn't recall who were present at the organization meeting.

Q. You do not recall whether Mr. Coogan was there?

A. I do not.

Q. Don't you recall that you and Mr. Coogan were there on a committee at that time, at that meeting, and you asked to be excused since you were to be away for the next three or four weeks and could not attend the succeeding meetings?

A. I wouldn't be able to recall that.

Q. You don't recall that you took a trip to the Mid-West immediately after this organization meeting for a period of four weeks, and did not return to the East for a matter of almost a month?

A. Well, I—why, that's the hardest thing in the world to try to recall what has happened back in that period.

Can you recall what has happened in 1916?

Trial Examiner Norwood: You may just state whether or not you do recall it.

The Witness: No, I do not.

By Mr. MacIntyre:

Q. Do you recall this memorandum Mr. John Morron gave you, taking you to task for having made a record, or permitting a record to be made, of certain things that took place at this Raleigh Hotel meeting in Washington?

31064 A. I testified I did not recall.

Q. You have no recollection whatever?

A. I have no recollection whatever.

Q. You have no recollection of having attended the meetings with Mr. Coogan here in Washington?

A. I haven't any recollection of it. The records will show.

Q. What is your recollection as to when you became president of The Cement Institute?

A. March, 1931.

Q. What date?

A. Oh, I wouldn't recall that, definitely.

Q. What is your recollection as to the day on which you ceased to be president of The Cement Institute?

A. In June, 1933.

Q. What day?

A. I couldn't recall that, offhand. The minutes will show.

Q. Have you forgotten since Mr. Withrow questioned you about that?

A. Well, I don't try to carry all of these details in my head. If I did, I wouldn't be able to take care of other matters.

Q. Well, coming back to this meeting that you attended with Mr. Holway and Mr. Campbell and certain railway officials in New York—

A. Yes.

31065 Q. —on June or July 22, 1931.

A. Yes.

Q. I believe you told Mr. Withrow that you did not make certain statements at that meeting.

Can you tell me just what you did make in the way of statements at that meeting, Mr. MacFarland?

A. My only recollection of the statements in that meeting is that I told the railroads—the railroad people there—that I felt that if they would reduce their short-haul rates up to a distance of about fifty or sixty miles, increase their minimum loading, they could get back considerable business that they had lost.

Q. That is close to eight years ago, isn't it, since you made those statements?

A. Yes.

Q. What did Mr. Eysmans say in response to that?

A. I can't recall that.

Q. You do recall what you said, though, very clearly?

A. Very definitely.

Q. Do you recall Mr. Collyer, R. N. Collyer, being present at the meeting?

A. I think—yes, he was present, he—

Q. What did he say?

A. I don't recall what he said. I don't know that he said anything, or not.

31066 Q. How far is your office from Mr. Holway's in Ohio?

A. I should say about a hundred miles.

Q. Any other cement manufacturers' officials have offices closer to his office than yours?

A. There are.

Q. How far is the nearest one to his office—that is, from his office, I mean.

A. Probably five or six miles.

Q. Didn't Mr. Charles Schmutz, in 1931, have an office two blocks from his?

A. Oh, I was thinking of the mill—yes—yes, I think Schmutz had an office, I believe, a short ways away.

Q. Yet Mr. Holway saw fit to pass up Mr. Schmutz five or six blocks away and travel a hundred miles to see you about this thing, didn't he?

A. I don't know.

Q. He did do it.

A. I don't know.

Q. He came to see you?

A. He came to see me. I don't know that he passed up Mr. Schmutz.

Q. Mr. Schmutz was not president of The Cement Institute, was he, at that time?

A. No.

Q. Isn't it a fact, Mr. MacFarland, that Mr.
31067 Schmutz was making more sales of cement, heavier volume in sales of cement to Mr. Holway than you were at that time?

A. I haven't the record.

Q. Well—

A. I presume so; he was the closest mill.

Q. Were you making any sales out of the Medusa mills to W. W. Campbell as of that time?

A. I have forgotten. I don't think we were.

Q. Yet Mr. Campbell came all the way from New Wilmington, Pa., to see you in Cleveland, didn't he?

A. Yes.

Q. Other cement manufacturers were nearer his place of business than yours, were they not?

A. I should say so.

Q. Do you think that the fact that you were president of The Cement Institute had anything to do with that at all?

A. I do not.

Q. Just a likeable fellow in that respect that caused him to travel all the way across the State of Ohio to see you in an effort to get you to go to New York?

A. Is that a question or comment?

Q. I am asking you if that is your surmise?

A. No.

Q. What is your surmise as to why he traveled all the way across Ohio to see you?

31068 A. I would say that in all probability because I had been in the cement business longer than anybody else; I probably knew more customers, more dealers, than any individual cement manufacturer.

He also knew my attitude toward dealers' distribution, and I think he looked upon me as—in that light—rather than in the light of his being a customer.

Q. Did he look upon you in the light that you disliked and discouraged trucking of cement?

A. Not at that time.

Q. Did he look upon you in the light that you were president of The Cement Institute?

A. He did not.

Q. You are positive of that, are you?

A. So far as I know. I never acted with him or never worked with him as president of The Cement Institute.

Q. Well, at the time you attended this meeting in New York, July 22, 1931, and subsequently in Philadelphia, February 7, 1932, with Mr. Campbell, you were president of The Cement Institute, were you not?

A. I was president of The Cement Institute but I was representing the Medusa Company.

Q. Only representing the Medusa Company?

A. Only representing the Medusa Company.

Q. And attended those meetings in no other capacity?

31069 A. No other capacity whatever.

Q. You were a citizen of Ohio at that time, were you not?

A. You would have to look up the record. I don't know when I became a citizen of Ohio. I think it was in 1932.

Q. Well, this was—this meeting was in 1932?

A. Well, I think it was later in 1932.

When was the Presidential election year,—1932?

Q. Yes.

A. All right, I became a citizen just before the Presidential election so that I could vote—

Q. You did not attend this meeting in New York as a citizen?

A. I beg your pardon?

Q. You did not attend this meeting in New York as a citizen, merely as vice-president of the Medusa Portland Cement Company?

A. Right.

Q. Not as a citizen?

A. No.

Q. Well, in what capacity were you and Mr. Boynton acting when you carried on this correspondence about these cartoons, Respondents' Exhibits 2179, 2180, 2181, and 2182?

A. As vice-president of the Medusa Company.

Q. Not as a citizen of Ohio, or any other State?

A. Well, that's rather a peculiar question, isn't it?

I was a citizen of some State.

31070 Q. Yes. You were president of The Cement Institute at the same time, but you say you were not acting in that capacity?

A. No, I wasn't acting in the capacity as a citizen. I

was acting in the capacity as vice-president of the Medusa Company.

Q. Well, now, referring to Respondents' Exhibit 2180, what interest was it to you as vice-president of the Medusa Company as to any squabbles occurring between the railroads and motor truck lines?

A. Interest in our customers' welfare, and customers' good will.

Q. Well, this is something that was occurring not between your customers but between the motor truck lines and the railroads. Just what was your interest there, if it was not as a citizen or as president of The Cement Institute?

A. I answered the question.

Q. Your interest was none other than as you described?

A. No.

Q. You had no interest in seeing the railroads get back this tonnage and being rehabilitated, so to speak, at that time?

A. No interest other than the interest that would serve us in connection with securing more customers and having the good will of our present customers.

Q. Well, of what interest was it to you and to Mr. Boynton that cartoons such as Respondents' Ex-
31071 hibit 2179, be distributed to the people of the country?

A. So far as we were concerned, that was the interest that I had. Mr. Boynton cannot answer for himself because he is dead; but my testimony on direct was that I felt that Mr. Boynton, representing the New York Air Brake Company, felt that the railroads getting back more business would create the use of more cars, and, therefore, more air brakes.

Q. Well, what about you? You are speaking now for Mr. Boynton. Let us hear from you.

A. Didn't I speak for myself?

Q. We are talking about another document now.

Trial Examiner Norwood: The objection is overruled.

A. Customers' good will was my answer.

Q. You felt that the motorist on the highway would probably result in good will through dealers, if you took action such as you told Mr. Boynton you wanted to take with respect to this program mentioned in connection with Respondents' Exhibit 2179.

A. Is that a statement or a question?

Q. No, it is a question.

A. What is the question?

31072 Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

Trial Examiner Norwood: I think that Counsel might amplify that question a bit.

Mr. MacIntyre: All right. Delete the question and I will start over again.

By Mr. MacIntyre:

Q. Is it true that you felt that a motorist driving on the highway would take notice of your publicity and propaganda campaign to have trucks removed and thereby reflect itself in good will through your dealers?

A. No, indeed.

Q. Well, just what did you have in mind, then?

A. I had in mind that if—

Q. With respect to Respondents' Exhibit 2179.

A. Well, I would have to couple that with the whole trucking picture. I had in mind that as many of our customers, and prospective customers, felt that the trucking being done in an unregulated way was interfering with their business, that if I could be of any assistance whatever to create customers' good will—

Q. In what manner was trucking interfering with your business,—the Medusa Portland Cement Company,—Mr. MacFarland?

A. Because the customers were objecting to it.

Q. Those customers being Mr. Holway, of the

31073 Ohio Builders' Association and National Builders' Supply Association, and Mr. Campbell?

A. And many others.

Q. Who were also members of those associations?

A. Some were and some were not.

Q. Can you name me a single dealer at this time, Mr. MacFarland, who protested to you about this trucking, and who were not members of those two associations I have named?

A. It would be hard for me to say which were and which were not members; single dealers—I can mention single dealers that were objecting to trucking.

Q. Were these two objectors I have mentioned, Mr. E. J. Holway and Mr. W. W. Campbell, were members of those two associations, and, in fact, officers, were they not?

A. What associations were those?

Q. The Ohio Builders Supply Association and the National Builders' Supply Association?

A. Mr. Campbell was National Builders' Supply Association. I have forgotten whether Mr. Holway was the Ohio Builders' Supply Association or not at that time.

Q. You know him as having been a member of that, do you not?

A. I think he was a member, yes.

Q. And Mr. Ed C. Kinney was its executive secretary, wasn't he?

A. Yes.

31074 Q. He also objected to trucking, did he not?

A. I would not say that Mr. Kinney objected to it. His members objected.

Q. He acted for them in placing those objections before you?

A. Undoubtedly.

Q. Isn't that correct?

A. Yes.

Q. Well, I ask you now in what manner did it interfere—that is, the trucking of cement—interfere with the business of the Medusa Portland Cement Company?

A. We felt that instead of the continuance of an unregulated practice, which was being objected to by our customers and our expected customers, it would be good business to try to cater to the customers' desires.

By Mr. MacIntyre:

Q. Well, you did not eliminate trucking entirely, you just regulated it; is that right?

A. Not that I know of. I cannot testify as to that.

31075 Q. Isn't your company still permitting trucking on a particularly regulated basis in Ohio?

A. I cannot testify as to that. I am not now, nor have I been for a long time, taking part in the gray cement business.

Q. Well, coming back to these contacts with your competitors at the time that you were president of The Cement Institute, you say that you did not act at all while you were president of The Cement Institute in any capacity whatever?

A. Only in keeping together the funds of the Institute, seeing that the Rate Bureau was maintained, and then later in connection with this Norris resolution to send out

some circulars and data, and finally when the N. R. A. was brought about—I do not know whether it was the law at that time, but it was proposed.

By Mr. MacIntyre:

Q. What did you have to do with the Rate Bureau Service during the time you were president of The Cement Institute—that is, with its Freight Rate Bureau Service?

A. Nothing in detail. I simply was, as president of The Cement Institute, conferring at various times with the secretary in regard to various applications for
31076 the supplying of rates; some of the States asked for rates during that period.

Q. You did not confer with anyone other than Mr. Lundborg, its secretary, in that connection?

A. Well, Mr. Coffin, as trustee, and I used to talk about the question of conserving the funds, and I would not be sure whether we ever talked about rates, or not.

Q. You did talk with the trustees of The Cement Institute, then?

A. Mr. Coffin.

Q. And you were president?

A. Mr. Coffin, as trustee.

Q. None of the other trustees?

A. There were a few of them left. I have forgotten now who they were. The records would show. We had no meetings.

Q. I do not understand.

A. We had no meetings, and there was no occasion for conference.

Q. Well, I am asking you about conferences, whether they were scheduled or not, now.

A. Well, I had none whatever.

Q. No conferences of any kind?

A. No.

Q. How did you carry on this Rate Bureau Service by merely contacting Mr. Coffin?

A. Well, Mr. Lundborg was secretary and he
31077 had a staff to carry it on. I was not bothering with the details.

Q. Did you confer with Mr. Blocher in Chicago about it during that time?

A. Mr. who?

Q. Blocher.

A. Never heard of him.

Q. What about Mr. Reigart of the Freight Rate Bureau in Bethlehem, Pa.?

A. I do not know him.

Q. You did not know anything at all about the activities of those two freight rate bureaus of The Cement Institute, then? That is, as to who operated them or how they operated; that is, Mr. Blocher and Mr. Reigart?

A. I would not recall Mr. Blocher, he may have been in The Cement Institute in Chicago. A man by the name of Foster was carrying on in charge of the Chicago office, and so far as Reigart is concerned, I do not know anything about him.

Q. You never head of him?

A. I never heard of him.

Q. You do recall Mr. Foster?

A. I recall Mr. Foster, yes.

Q. Did you have any conversations or conferences with him during the time you were president of The Cement Institute—that is, between May, 1931, and June, 1933?

A. Oh, when I was in the office I might have said
31078 something to him about the rate service, or what not, but he was a clerk in there, and I was not bothering with the details.

Q. You did not go into the management of his business there, the Freight Rate Bureau Service?

A. No, indeed.

Q. Who decided matters of policy with respect to his activities while you were president of The Cement Institute?

A. Mr. Lundborg had general charge, as secretary.

Q. But you, as president, and the other members of the board of trustees, as members of the board of trustees, had nothing to do with the activities of those bureaus?

A. No reason for having anything to do with them.

Q. They just ran themselves?

A. It was set up and it was a matter of detail from there on.

Q. Whether they were violating the law or whether they were staying within the law were matters for Mr. Lundborg to decide, is that correct?

31079 A. I had figured that the law had clearly set forth the rate situation in the decision of the United States Supreme Court.

Trial Examiner Norwood: Well, he was asking you with

regard to the authority there, who was making the decisions with respect to the subject he mentioned.

The Witness: I answered that before, Your Honor, when I told him that it was a matter of detail.

Trial Examiner Norwood: Then it was Mr. Lundborg who made these decisions, was it?

The Witness: Covering matters of detail. If there had been any questions of policy come up he would have consulted me.

Trial Examiner Norwood: Well, was this question that the Counsel has just made, was that a matter of detail which is included in your previous answer?

The Witness: What was the question?

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Was that a question of detail which Mr. Lundborg should decide?

The Witness: Your Honor, didn't my answer cover that?

31080 Trial Examiner Norwood: I am asking you again to tell me, was it or was it not a question of detail which Mr. Lundborg decided?

The Witness: Well, there was no question because the Rate Bureau had been set up. The details of handling the Rate Bureau had all been agreed upon, and it had all been handled exactly in accordance with the decision that had been given by the United States Supreme Court in the Cement case, therefore there were no questions that came up during that period for any executive decision.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. No questions were referred to you by Mr. Lundborg as to whether or not they were conforming to the law or whether that they were possibly violating the law in the conduct of these activities of The Cement Institute?

A. I have no such recollection.

Q. You just gave him carte blanche on that and let him go; is that correct?

A. He had his set up in the way in which he was to compile his rates and the subscribers to the Bureau, and who were to be furnished with them, and as I said before it became entirely a matter of detail.

Q. Nothing as to the matter of policy was decided by

you or the board of trustees of The Cement Institute
31081 during that entire period, May, 1931, to June, 1933, concerning the operation of the Freight Rate Bureau?

A. Concerning the operation of the Freight Rate Bureau, I would say possibly the question of—I think New York State asked to have some of our freight rate books.

Q. That was a matter of policy that you and the board of trustees took up?

A. No, that I took up, I believe as I recall it; I think Mr. Coffin and I discussed the matter and determined that we would let New York State have the freight rate books at a price that we agreed upon that they should pay. That is my recollection.

Q. Was any other matter of policy referred to you during that period by Mr. Lundborg?

A. Well, the question, as I said before, of this Norris resolution was brought up, and whether or not we should broadcast to the different members the decisions that our attorneys had said that they would be willing and glad to advise different members as to the procedure.

Q. Any other matters of policy during that two-year period you were president of The Cement Institute you had referred to you?

A. None that I recall.

Q. You do not recall any problem of the cement industry, of the Medusa Company, that you handled while you were president of The Cement Institute in con-
31082 tact with competitors and dealers?

A. No, I do not.

Q. Does trucking stand out in your mind as one of the pressing problems of the industry during that period?

A. It stood out as one of the problems that was affecting the Medusa Company.

Q. Isn't it a fact, Mr. MacFarland, that it affected other companies as well as Medusa in the same manner that it affected the Medusa Company?

A. Are you asking for an opinion?

Q. I am asking you for your knowledge.

A. Not from my knowledge.

Q. Well, what is your opinion on it?

A. If you want my opinion I should imagine it would affect them in the same way.

Q. Didn't some of the representatives of your
31083 competitors tell you that it had affected them in the same manner that it was affecting the Medusa Company?

A. I do not recall that.

Q. You do not recall Mr. W. A. Davis, of the Standard Portland Cement Company, having told you that?

A. No.

Q. Just before these meetings in New York?

A. I do not. My action in connection with those meetings was entirely selfish on the part of the Medusa Company. I was trying, if possible, to get a little edge on my competitors.

Q. You were anxious to do something that would help the Medusa Company in settling this trucking problem that you had an opinion was the same sort of problem with respect to your competitors, though, weren't you?

Mr. Withrow: May we have the question read, if Your Honor please?

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Withrow: I object to that.

The Witness: It seems to me that question is rather involved.

Trial Examiner Norwood: Did you know that trucking affected your customers in the same way that it affected you?

The Witness: As a matter of opinion.

31084 By Mr. MacIntyre:

Q. And you had based on that opinion a desire to help your competitors in the same manner that you were helping the Medusa Company in settling this trucking problem, didn't you?

A. I did not.

Q. In other words, if it affected them the same way as it affected the Medusa Company, and you wanted to get that effect cleared away so far as Medusa was concerned, you did not want to clear it away with respect to your competitor; is that correct?

A. My answer to that would be, if you were a merchandiser you would know a man who blazed the trail to do something to help customers and prospective customers is the fellow that would benefit by getting the business.

Q. Do you feel that the Medusa Company was blazing the trail on this trucking problem?

A. I felt that we were doing something that our customers wanted.

Q. Isn't it a fact that you knew at the time that you went to New York that some of the companies in the East had already discouraged trucking from their plants?

A. I could not answer that. I was not familiar with the eastern situation.

Q. Well, isn't it a fact that you did know that some of the companies in western Pennsylvania had already
31085 taken steps to discourage trucking before you went to New York, and that Medusa was not therefore a trail blazer in that respect?

A. I would say that my recollection is that the other companies were not taking any active interest up to that time.

By Mr. McIntyre:

Q. Did representatives tell you they were not?

A. No. You simply asked for an opinion and I gave it.

Q. Don't you recall having discussed this problem with Mr. W. A. Davis, of the Standard Portland Cement Company in Cleveland prior to your going to New York for the July 22, 1931, meeting?

A. I do not. I think he would be the last man I would discuss it with.

Q. For fear he would tell somebody about your conference?

A. No, simply because he was a very active competitor.

Q. What about Mr. McKeon of the Castilia Company? Do you recall your discussion with him before you went to New York?

A. No.

31086 Q. Was he less active as a competitor of yours than Mr. Davis of the Standard Portland?

A. I should say he was very much less.

Q. In fact, you are producing all the cement that he sells now, aren't you?

A. I would say yes, because he is working for us.

Q. Selling it under the Castilia brand, his original brand, however, isn't he?

A. He is not.

Q. Who is selling the cement that you manufacture and which is sold under the Castilia brand?

A. I do not know of our selling under the Castilia brand.

Trial Examiner Norwood: I think we are getting a little off the lot on this.

Mr. MacIntyre: All right. I was attempting to clear up a volunteered answer of the witness there.

By Mr. MacIntyre:

Q. Do you recall a meeting that you had with competitors of yours, or representatives of competitors in the Hollanden Hotel in Cleveland on November 27, 1931, at which time the problem of trucking cement was discussed?

A. I do not recall any such meeting.

Q. That does not stand out in your mind as clearly as the New York meeting?

A. I do not think I was ever present at any such 31087 meeting; I do not recall it.

Q. Are you positive you were not?

A. I am not positive. If you have any evidence that I was there I will refresh my memory, but I do not recall it at all.

Q. You would only say you were there if we show you evidence that you were there?

A. I should say so, because I do not recall it.

Q. Otherwise you will say you were not there; is that right?

A. Absolutely.

Q. About this meeting in Chicago of August, 1931, Mr. Kinney brought that bundle of letters up to discuss with you; do you recall your discussion of the trucking problem with Mr. B. F. Affleck at that meeting?

A. I did not.

Q. You merely discussed it with Mr. Kinney; did not talk to anyone else?

A. Not to my recollection.

Q. How many were present at the meeting?

A. I could not tell now. Have you the minutes?

Q. There were more there than Mr. Kinney, though, weren't there?

A. I do not recall that. If I saw the minutes of the meeting I could be refreshed and tell you. You are asking about a specific date now, and there may have been a meeting, or may not, at that time.

31089 Q. Do you recall the exchange of the bundle of letters between you and Mr. E. C. Kinney, of the Ohio Builders' Supply Association during August, 1931?

A. I do.

Q. Didn't you have those letters in your possession at the Chicago meeting of August 21?

A. I do not know of any meeting that those letters were present. My recollection is that I saw Mr. Kinney individually in Chicago when he handed me a bundle of letters.

Q. And where were you when he handed the bundle of letters to you?

A. I would not say where I was, whether I was in the Blackstone Hotel or the Congress Hotel or the Chicago Athletic Club, or where it was.

Q. You knew that a meeting was in progress in Chicago, then?

A. I do not know; I do not know that I did.

Q. You were told by Mr. Kinney that a meeting was in progress at that time for the purpose of discussing the trucking problem, weren't you?

A. No, indeed. What is the evidence?

31090 Q. What was your business in Chicago on that occasion if if was not for the purpose of attending the meeting?

A. That would be hard to answer because I go to Chicago practically once every month or six weeks on various matters of business in connection with the company.

Q. Well, as to this particular matter, you recall letters in your discussion with Mr. Kinney, can't you recall any other business that you transacted in Chicago on that occasion?

A. I cannot. I recalled the letters because my memory was refreshed when I saw that I had returned the letters with a letter that I had sent to Mr. Kinney.

Q. You are positive you did not atend any meeting?

A. That is my recollection.

Q. Well, what was your testimony on it?

A. I do not think the question was asked on direct.

31091 By Mr. MacIntyre:

Q. I am talking about your testimony now as to whether or not you did, in fact, attend the meeting during

August, 1931, at which time the trucking problem in the cement industry was discussed?

A. I have not attended a meeting in Chicago with our competitors where the trucking problem was discussed.

Q. Well, with whom did you attend the meeting?

A. Only with Mr. Kinney, so far as talking about trucking was concerned.

Q. You do not recall anyone else?

A. No.

Q. At present?

A. No.

Q. You do not recall Mr. Holway being there?

A. I do not think I have ever seen Mr. Holway in Chicago.

Q. Do you recall Mr. Campbell being there at the meeting?

A. I am very sure I did not see Mr. Campbell in Chicago.

Q. Do you recall meeting Mr. Engene Morris, of the Central Freight Association, in Chicago?

A. I never met him in my life.

Q. You don't know him?

A. I do not know him.

Q. Or Mr. Affleck, of the Universal Atlas Cement Company?

A. I would not say I did not see Mr. Affleck be-
31092 cause I frequently saw him when I was in Chicago.

Q. Well, can you testify that you did not see him on that occasion?

A. That would be a hard thing to say. I doubt it, but—

Q. Do you recall discussing this trucking problem with Mr. S. T. Crapo, of the Huron Portland Cement Company, during 1931?

A. Never.

Q. You left that up to Mr. John to carry on the discussion?

A. I do not know what Mr. John did.

Q. Well, with your experience in the railroad business previous to the time that you came into the cement industry, and with your knowledge of the trucking problem as one vitally affecting your company, and likewise affecting other members of the cement industry, in your opinion wasn't it the natural selection of you as president of The Cement Institute to represent the industry in the

discussion of that problem in New York on July 22, 1931?

31093 A. I would say that it was more natural to think
31094 of me with my railroad experience to be one to talk to the railroad people, and with my general experience in the cement industry to be one to talk to—I think there is no reason at all for anyone to feel that I acted as president of The Cement Institute, because I did not.

By Mr. MacIntyre:

Q. Well, you do think it was because of your experience and your intimate knowledge of the problems just as you have outlined; is that correct?

A. My general experience; in the time of my history with the railroad business there was no such problem, there was no trucking of any kind. That was back of 1908. Therefore, the only connection I could make with the idea of their wanting me to go was that these men knew I had some railroad experience, I knew the railroad men, I knew the railroad problems, I knew the rate situations, and—

Q. And they knew—

A. —and so far as the cement industry was concerned, they knew definitely that I was acting as vice-president of the Medusa Cement Company and in no other capacity.

Q. Well, they knew that you had an intimate knowledge of the problems of the cement manufacturers' attitude on trucking, didn't they?

A. That's a guess. I presume they felt I knew something about it.

31095 Q. And the cement manufacturers who elected you as president of The Cement Institute just a couple of months before knew, of course, of your connections with the railroad industry previous to the time you came into the cement industry, didn't they?

A. I don't know.

Q. Don't you think that some of them in the industry knew of your past experience and past connection with the railroad industry?

A. Probably some of them did.

Q. Well—

A. Probably a number did not.

Q. Well, some of these older heads that were on the board of trustees and had something to do with the election of you as president, did know of your connection with the railroad industry, didn't they.

A. I couldn't testify to that.

Q. Who nominated you for the presidency?

A. I don't know; I have forgotten.

Q. Well, the record will show who he was.

A. I presume so.

Q. Mr. John knew of your past experience with the railroads, didn't he?

A. He undoubtedly did, or he probably wouldn't have hired me.

31096 Q. Mr. Blaine S. Smith knew of your past connection with the railroads, didn't he?

A. Yes, I imagine so.

Q. Mr. B. F. Affleck knew of your past experience with the railroads, didn't he?

A. I don't know whether he did at that time.

Q. At what time?

A. At the time I was elected president of the Institute—I think he didn't know about it until he became—until the consolidation or the purchase of the Atlas Company, which was—

Q. Mr. Coffin, George Coffin, trustee of The Cement Institute, knew of your past connection with the railroads, didn't he?

A. I don't know.

Q. Mr. J. F. Twamley knew of your connection with the railroads, didn't he?

A. I don't know whether he did or not.

Q. Mr. Charles Hogan, of the International, knew of your connection with the railroads, didn't he?

A. I doubt it.

Q. What about Mr. Struckman of the Lone Star International Company?

A. I very much doubt that he knew of it.

Q. Mr. H. C. Koch, he knew about it?

A. I don't believe he did.

31097 Q. What?

A. I don't believe he did; he may have.

Q. At least a number of them that participated in your election as president of The Cement Institute did know of your connection with the railroad—

A. I can't tell.

Q. —railroad industry?

A. I can't tell. I testified that I felt that Mr. John did, and Mr. Blaine Smith; the others are a guess.

Q. Had you, at previous meetings of The Cement Institute—that is, prior to your election as president of that body—expressed yourself on the trucking question?

A. I am very sure I had not.

Q. You have no recollection at this time?

A. I have no recollection.

Q. Is it your testimony that you did not?

A. I would say I did not, because I hadn't been in the habit of doing that at meetings.

Q. What about in personal conversations with your competitors, outside of Cement Institute meetings?

A. Oh, I wouldn't say that I hadn't said something about the trucking individually to one or two of the competitors; I wouldn't testify that I had not.

Q. So they were apprised of your stand on that problem before you were elected president of The Cement In-
31098 stitute; is that correct?

A. No, no.

Q. Some of them were at least, were they not?

A. No.

Q. That is, those to whom you had expressed your opinion?

A. No, I didn't testify that prior to the time of my election to The Cement Institute that I had discussed it.

Q. Just when did you express these opinions to the various members of the industry with whom you had conversations?

A. It would be hard to tell just when it was as I don't know. I said I wouldn't testify that I had not talked individually with some of my competitors, but I don't recall any conversations regarding that.

Q. Your mind is almost a blank on that at this time?

A. Is that a statement?

Q. No, I am asking you that as a question. Is that right?

A. Which I did not recollect.

Q. Well, isn't it your impression that that is why you were elected president of The Cement Institute—that is, because of your intimate knowledge of the trucking problem and your past connection with the railroads?

A. No, it is my impression I was elected president of the Institute because they wanted somebody that knew something about taking care of the finances and conserving

the money we had on hand, and somebody that would
31099 operate in the state of the Institute when there was nothing being done except the Freight Rate Bureau.

Q. And you said you didn't have anything to do with the Freight Rate Bureaus,—didn't even know the men that ran them?

A. I didn't say that.

Q. You said you didn't know Mr. Reigart?

A. Well, he was not with the Institute, as I recall it.

Q. You don't know Mr. Blocher?

A. I don't recall Mr. Blocher. He may have been there as a clerk; I didn't know all the clerks in the office.

Q. You didn't attend any meetings of the board of trustees during the time you were president of The Cement Institute?

A. What board of trustees?

Q. Of The Cement Institute.

A. Oh, there was none.

Q. Had no meetings?

A. No meetings.

Q. During the entire two periods you were president?

A. Up until the time we called the meeting for the reorganization.

Q. Mr. J. B. John, president of the Medusa Cement Company, was a member of the board of trustees of The Cement Institute for a large part of that period?

A. I don't recall just what period. I know he was
31100 a member of the board of trustees at a certain time; I don't recall the period.

Q. He was also a member of the advisory committee of The Cement Institute during the remainder of that period, was he not?

A. I think the minutes show that. That was after my resignation.

Q. It was the early part of your presidency?

A. How?

Q. During the early part of your presidency, I think the record shows he was a member of the advisory committee.

(Witness makes no response.)

Q. Didn't you have a discussion with Mr. John about the trucking problem during the time you were president of The Cement Institute?

A. I would not say that I didn't have a discussion with him during that time, because he was president of my

company, and any discussions I had were in connection with the Medusa Company.

Q. Well, isn't it a fact that you do recall having had discussions with Mr. John during that period, during which you discussed the trucking problem?

A. I don't recall any such discussions. I probably did, as I discussed many things with the president of my company.

Q. He was a trustee of The Cement Institute, wasn't he?

A. I don't know whether he was during that pe-
31101 riod or not. The record will show it.

Q. Well, part of it,—part of the period?

A. Well—

Q. (Showing document to witness.) I show you Commission's Exhibit 3005-A, and ask you whether or not that the other members of the board of directors of the Portland Cement Association, who appear in that list along with Mr. John, or, at least, a number of them, were not also during that same period members of the board of trustees of The Cement Institute, and served along with Mr. John during the time you were having all the discussions with Mr. John about the trucking problem?

31103 A. If you will let me see the record of the minutes of the Institute, and compare the names, I can tell you.

By Mr. MacIntyre:

Q. Well, how good is your recollection on it?

Here is the name of Mr. Charles E. Conn,—wasn't he a member of the board of trustees of The Cement Institute, to your knowledge and recollection?

A. I can't answer that question without refreshing my memory from the record of the minutes, because there were changes in the board of trustees from time to time, and in the advisory committee, and if I should attempt to testify that any one of those individuals were members of the board of trustees of The Cement Institute, in the period set here, July 11 and 12, 1933—or 1932—I would only be testifying at a guess.

Q. You have no recollection, now, then—that is, an independent recollection—as to who the members of the
31104 board of trustees of The Cement Institute were at the time you were president?

A. At the time I was president there were—I remember

Mr. Coffin very distinctly because we worked together so much. The other members of the trustees, a number of them passed out by the resignations, and, without looking at the record, I would really forget who finally remained in. I think Mr. Monday.

Q. M. C. Monday?

A. M. C. Monday remained in, I believe.

Q. You recall only those two at the present time?

A. I recall only those two at the present time.

Q. Do you recall Mr. G. S. Brown, of the Alpha Company, as continuing?

A. Oh, he had resigned.

Q. What about Mr. Morris Kind, of the Hercules Company, didn't he continue as—

A. I have forgotten.

Q. Mr. Charles L. Hogan, of the—

A. I believe that they had resigned.

Q. Mr. J. J. Porter?

A. I don't recall his being a member of the board.

Q. Mr. Blaine S. Smith?

A. I think that he had resigned, I believe. What was Mr. Smith's company?

31105 Q. Penn-Dixie.

A. I have forgotten.

31106 Q. On direct examination, Mr. MacFarland, you testified that the long drawn-out meetings of June 15 and June 16, 1933, of the industry were occasioned by its difficulties in considering the complexities of the Code it then had under consideration.

Do you recall that testimony?

A. I do.

Q. Who prepared that Code?

A. I think that Code was prepared by our attorneys, by Mr. Donovan, it is my recollection.

Q. So complex that you couldn't consider it for some time; that is, couldn't complete your consideration of it for some time; is that correct?

31107 A. During the two-day meeting it was considered.

Q. And at whose request did he prepare that Code?

31108 Q. Who requested Mr. Donovan to prepare that document, Mr. MacFarland?

A. I have forgotten whether—my impression or rec-

ollection is that it was Mr. Coffin, probably Mr. Coffin and myself, after conference.

Q. And the document, then, that you and Mr. Coffin requested Mr. Donovan to prepare, was so complex that when the industry started to consider it it took it two days to really get any consideration of it; is that correct?

A. No, I wouldn't say that the document was so complex. I think there were certain matters in connection with the Code that we knew had to be taken up in connection with dealers' codes which were being prepared, and contractors' codes, which were being prepared, and there had to be much consideration given so that when the Code did come up and was adopted we would not have it taken away after some other body went before the N.R.A. to have their Code approved.

Q. Now, you have testified that the minutes of these meetings, including this one of June 15 and June 16, 1933, which was so long drawn out, correctly state what took place at the meetings,—is that your testimony?

A. That is my recollection.

Q. Now, is it also your testimony that they carry a record of everything that was included in the conversations among the competitors, and between the com-
31109 petitors, that attended those meetings; is that your testimony?

A. It was always customary to have a stenographer present and take the minutes.

Q. Well, of course, we know that.

A. Yes.

Q. I am asking you now what your testimony is on the point that I have just concluded.

A. So far as I know, there was no discussion—that is, that they did not set forth in the minutes.

Q. Can you state without any reservation that the minutes do include all statements of the competitors at these meetings?

A. I would say they do.

Q. Are you positive that they do?

A. Well, we were not in the habit of holding meetings and keeping out anything from the minutes that was discussed at the meeting, and, therefore, on that basis I would say they include everything that was discussed in the meeting.

Q. Well, you are going back to the refuge of habit. I

am asking you now about just how far you are willing to commit yourself, that they did contain a record, or present themselves as records of everything that you and your competitors talked about at these meetings?

31110 A. I would say that they do.

By Mr. MacIntyre:

Q. And that nothing was said by anyone that is not shown on the minutes,—is that your testimony?

A. I would say so.

Q. And you say that without reservation?

A. Yes.

Q. Now, our reference earlier this morning was to Mr. Boynton. I believe you stated on direct examination that he was at one time manager of the Cement Information Bureau. Do you recall that testimony?

A. I do.

Q. That is the same Mr. Boynton that is referred to in—or writer of Respondents' Exhibit 2181?

A. It is.

31111 Q. And the same man with whom you exchanged letters concerning these cartoons, Respondents' Exhibits 2179, 2180, and 2182?

A. The same man.

Q. And 2181?

A. Yes.

Q. What organization was the Cement Information Bureau, of which he was manager,—what organization was it affiliated with, Mr. MacFarland?

3111 A. I do not know of any.

By Mr. MacIntyre:

Q. Well, who supported it?

A. Contributions by the different companies.

Q. What companies?

Mr. Withrow: Your Honor, could I have my objection to this whole line?

By Mr. MacIntyre:

Q. Cement manufacturers?

Trial Examiner Norwood: Yes.

Answer the question.

By Mr. MacIntyre:

Q. Were they cement manufacturers, the companies?

A. Cement manufacturers, yes.

Q. Companies represented by you contributing to it?

A. I think that was during the period I was with the Atlas Company, and my recollection is that the Atlas contributed.

Q. Don't you know that other companies who are named as Respondents in this case also contributed to the support of that organization?

A. I know that there were other companies who contributed, but I have not the slightest idea who they were.

Q. You still know them as cement manufacturers?

A. Cement manufacturers.

31113 Q. Are the facts, or the circumstances, I should say, of Mr. Boynton's previous connection with the cement industry, the cement manufacturing industry, and the railroad industry, have anything to do with his desire to aid you in this propaganda campaign against trucking, in your opinion?

Q. Well, subsequent to his affiliation with the cement industry in the capacity about which we have been talking, he did represent this air brake company which was interested particularly in the railroad industry; is that true?

A. He was handling public relations for the New York Air Brake Company.

31114 Q. And had previously handled public relations for the cement manufacturing companies; is that true?

A. In charge of the Cement Information Bureau.

Q. You and he were willing to—in fact anxious and attempting to work out some plan whereby you could place before the public propaganda, I believe you said, against the trucking of cement; is that correct?

A. We wanted to place before the public propaganda to get the trucks regulated by either a federal or State statute.

By Mr. MacIntyre:

Q. What benefit do you think would come to your company and to other cement manufacturers who were affected in the same manner by the trucking of cement through regulation of the trucking of cement?

31115 Q. I mean, if you were able to eliminate trucking.

A. In answer to the second question, I can say that I cannot answer for my competitors, other manufacturers. For the Medusa Company I have answered, I guess,

about twenty times now that I was trying to get customers' good will.

Q. Well, how did you think it would help your company with respect to customers' good will or eliminating and regulating or hampering trucking of cement by them from your plant to their warehouse?

Mr. Withrow: Your Honor, I submit that question has been answered as the witness has said twenty times. I do not see any reason why we should go back over it and ask the same questions about the same subjects several times. The witness has given the same answers.

Trial Examiner Norwood: I should like for this witness to tell us how it would help his company to eliminate or regulate trucking which would not eliminate or regulate with respect to his competitors.

31116 The Witness: Will you—

Trial Examiner Norwood: How could you profit singly by this general regulation?

The Witness: We usually profit, Your Honor, singly to the extent that we are trying to do something first.

Trial Examiner Norwood: No, but if these rates had been given just to your company and not to any of your competitors.

The Witness: Oh, that could not be.

Mr. Leisure: There is no evidence in the record he has contended for any such situation, not the slightest.

Trial Examiner Norwood: Well, he has told us here that he is proceeding solely for his company.

Mr. Leisure: Yes.

Trial Examiner Norwood: None other.

Mr. Leisure: He has told us why.

Trial Examiner Norwood: And that he represents nobody else, and he does not know how it affects other companies. I just want to get his full explanation, his attitude to that. He has told us he represents his company, and his company only, and I think we have a right to know just what he thought he was going to do just by himself, and have these rates regulated just with respect to his own company and nobody else.

Mr. Leisure: There is no suggestion that he
31117 wanted to do that. There is no suggestion that he attempted to do that.

Trial Examiner Norwood: Well, let him bring that out.

The Witness: Your Honor, we could not have rates

regulated for our own company. They would have to be general rates.

Trial Examiner Norwood: Yes.

The Witness: Where the Medusa Company would benefit would be because we were trying to help and start a movement that was going to help the customers and our prospective customers, realizing that our competitors, of course, would benefit by the same thing, but we figured as good merchandisers that we benefited first.

Trial Examiner Norwood: And you knew that you could not benefit by this thing unless your competitors did benefit?

The Witness: They were bound to benefit by it.

31122 Q. Well, coming back to these meetings of these cement manufacturers, this Cement Manufacturers Protective Association, Mr. MacFarland, you have talked about the first one that you attended, the organization meeting. How frequently did you and your competitors have meetings of that kind—that is, as you can recall them now?

A. Oh, I have forgotten how frequently they were held.

Q. Well, were they once a month or quarterly, or

31123 once a year?

A. I do not know—pardon me.

Mr. Withrow: Your Honor—

The Witness: I do not know that there was any stated period. That is a long time ago, you know, that is almost before you were born.

By Mr. MacIntyre:

Q. Thank you.

Well, were they oftener than once a year?

31124 A. My recollection is that they were.

By Mr. MacIntyre:

Q. As often as once a quarter?

31125 A. It would be hard to recall. If you will turn up some of the minutes and refresh my memory.

Q. Attendance of a great many members of the industry was had at most of the meetings, weren't they, or wasn't there?

A. No, I would not say so, because, as I recall it, the Cement Manufacturers Protective Association only took care of the eastern situation.

Q. About all of the members in the East—I mean, all the members of the industry in the East were members of that Association, weren't they?

A. I would not say all. I think probably a very large percentage.

Q. About 16 manufacturers out of the total in the East, then?

A. Well, I have forgotten the number.

Q. Well, this Association of American Portland Cement Manufacturers, which Commission's Exhibit 3193 shows that you attended and acted in the capacity as a member of its Trade Conditions Committee. It met frequently, too, didn't it?

31126. A. My recollection is not clear as to how often those meetings were held.

By Mr. MacIntyre:

Q. How often did the committee meet of which you were a member?

A. I would hesitate to say without looking at the minutes.

Q. It met more than once a year, didn't it?

A. That is a long time back. That is before the organization of the Portland Cement Association, and I would not swear that we had more than one meeting before the Portland Cement Association was organized, although there may have been. That, as I recall it, is back into around 1910 or 1909.

Q. It came in about the time you came into the industry, didn't it; you came in 1908.

A. No. The Association of Portland Cement Manufacturers was in existence before I came into the industry. As I recall, the Portland Cement Association was or-

31127 ganized about 1911. I am not sure about that.

Q. Problems of importance to the industry were discussed at those meetings in the same manner that the importance to the trucking was discussed when you were president of The Cement Institute, weren't they?

A. Are you testifying that trucking was discussed?

Trial Examiner Norwood: He is asking you a question.

The Witness: Well, I testified that trucking was not discussed at these meetings. Trade practices and the best

trade practices were discussed as matters of recommendation to the members.

By Mr. MacIntyre:

Q. And they were considered at that time to be just as important to the industry as trucking was later considered to be important to the industry, weren't they?

31129 The Witness: I would say the trade practices were considered important; to have a sound trade practice was important, but never upon other than in a recommendatory way until the time of the N. R. A.

31130 By Mr. MacIntyre:

Q. Mr. MacFarland, on direct examination Mr. Withrow showed you Commission's Exhibits 1479 and 1470, letters from W. W. Campbell to you concerning this meeting in New York. I believe you described those as invitations extended by him to you to attend a meeting (showing documents to witness).

Is that your understanding of them?

Mr. Withrow: What were the numbers?

Mr. MacIntyre: 1462, 1479, and 1470.

A. 1462?

By Mr. MacIntyre:

Q. It goes all the way up to here, 1462 (indicating volume of exhibits to witness).

Mr. Withrow: Your Honor, I object to the question. It misstates the record. There is no such testimony with reference to Exhibit 1462 at all.

31131 Mr. MacIntyre: Well—

Mr. Withrow: As to the other two, he may have correctly stated the record.

Mr. MacIntyre: Well, let the witness confine his answer, then, to 1470 and 1479.

Trial Examiner Norwood: Answer the question as corrected.

A. As to 1479?

By Mr. MacIntyre:

Q. That's right.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. As to 1479 and 1472, that's my understanding.

Q. 1479 and 1470 (indicating).
(Witness holds up volume of exhibits to Counsel.)
Q. That is 1470, isn't it?
A. It looks to me like a "2".
Q. That is right; that is right, 1472.
A. That's my understanding.
Q. Of course, you had seen Mr. Campbell previous to the time that he had written you these letters?
A. That's my recollection.
Q. And you clearly understood from Mr. Campbell's letter—that is, Commission's Exhibit 1479—as to
31132 the purpose of the meeting?
A. I did.
Q. That is, as he set it forth?
A. Yes.
Q. Do you recall whether between the first time you saw Mr. Campbell, and at which time he mentioned the meeting, and the time you attended the meeting in New York, that you saw anyone in the industry outside of your company, and mentioned in anywise this trucking problem with them?
A. I think our question does not state the case.
Q. Well, what is the case?
A. What was the question, please?
Trial Examiner Norwood: Read it.
(Last question read by Reporter.)
A. The first time I saw Mr. Campbell the meeting was not discussed.
Q. Well—
A. That was at the time I was on my way from Cleveland to Pittsburgh and stopped in, when Mr. Holway first brought up the trucking situation.
Q. Well, between that time and the time you attended the meeting in New York, July 22, 1931, did you discuss the trucking problem with anyone in the industry, outside of your company?
A. I did not.
31133 Q. You are positive of that?
A. I am positive.
Trial Examiner Norwood: Did you mention the fact to any competitor that you were going to this meeting?
The Witness: I did not.

By Mr. MacIntyre:

Q. Did you discuss it during that period of time with Mr. John, of your company—that is, the trucking problem in the industry?

A. I wouldn't say definitely, but I probably did, because he was the president of the company, and I don't usually do things of that kind without consultation with the president.

Q. Well, now, are you prepared to say that Mr. John did not, in that time, also discuss the same problem with other members in the industry, outside of your company?

A. I can't say what Mr. John discussed; he never told me that he had ever discussed it.

Q. At the time you made up your decision to attend the meeting, or just prior to making up that decision, did you take into consideration the fact that you were president of The Cement Institute?

A. I had no thought about being president of The Cement Institute. I was acting entirely for the Medusa Cement Company.

Q. You did not give any thought to that, or men-
31134 tion that fact to anyone in connection with the meeting—that is, any of these people that were negotiating with you for your attendance at the meeting?

A. Absolutely not.

Q. Was the word "Cement Institute"—the word of your being president of The Cement Institute, that is, that was never mentioned?

A. Never, and the letters all came to me as vice-president—as vice-president of the Medusa Portland Cement Company.

Q. And you did not mention in any wise the fact that you were president of The Cement Institute?

A. Never.

31135 JAMES H. ACKERMAN, recalled as a witness for the Respondents, being previously sworn, testified further as follows:

Direct Examination by Mr. Brick.

I am vice president in charge of sales of the Law-
31136 rence Portland Cement Company, and have held that position a little over a year. When I appeared as a government witness previously in this case, I testified that I had been associated with Lawrence since about 1920. I started off as a clerk. I became assistant sales manager, assistant to the president, sales manager, and was made vice president about a year ago. I previously stated that I had been sales manager for a period of 5 or 6 years. Lawrence has been my only association in the cement industry.

Warren W. Ayres is president of Lawrence, Marion S. Ackerman is vice president; Edgar F. Sheppard is treasurer, and Earl P. Haubert is secretary. Mr. Ayres was elected president on the 1st of October, 1937. Previ-
31137 ously, Mr. Ayres had been a director of Lawrence for 4 or 5 years; that was his only experience in the cement industry. Frank H. Smith was his predecessor as president, and he had been president for 15 years. I would say, Frank H. Smith died in August 1937. Lawrence's principal office is Northampton, Pa. Lawrence is not
31140 affiliated in any way with any other cement company. None of the officers or directors of our company are connected with any other cement company. When I was previously on the stand I stated that our company had a mill at Thomaston, Maine, and one at Siegfried,
31141 Pennsylvania. We do not now have any warehouses or silos, or any other similar distributing facilities. In 1930, 1931 and 1932 we did have [distributing facilities] in Washington, D. C. It was operated under the name of the Washington Cement Warehouse Corporation.

Q. Now, I show you Commission's Exhibit 3126-B, and ask you if the Washington Cement Warehouse Corporation there referred to is the one about which you are testifying (showing document to witness)?

A. Yes, sir; it is.

Q. You might want to refer to that (handing document to witness).

Q. What was the nature of the organizations through which that silo or warehouse was operated?

31142 A. Well, the Lawrence Company, the Hercules Cement Corporation, the Edison Cement Corporation, formed a stock company to operate the Washington Cement Warehouse Company.

Q. From the exhibit to which I refer, it appears that the Lawrence Company held 39 shares of stock in the corporation. Do you recall what proportion to the total stock the 39 shares represented?

A. One-third.

Q. And what proportion did the other companies own?

A. One-third apiece.

Q. Now, what were the circumstances under which the arrangement was entered into?

A. Well, in 1929 the Lone Star Company was erecting silos, and distributing plant, in Washington. It was pretty evident from the size of the plant that they were building, and from its lay-out, that they were going into the trucking or retailing of cement in Washington. For a number of years our company had done a substantial tonnage in Washington, and we thought that to protect our interests we should duplicate that facility.

We had been doing business with the Rosslyn Steel and Cement Company, which was located quite close to the site of the Lone Star warehouse. They had silos there. We negotiated with them to lease their facilities, put

31143 ourselves in a position to meet the anticipated competition from Lone Star. The Lawrence, and the Hercules Company, and the Edison Company all had been dealing with the Rosslyn Steel and Cement Company.

Q. Do you mean by that that the Rosslyn Company had been the customer of each of the three cement manufacturing companies?

A. Yes, sir.

Q. And was it a dealer-customer of each of those three?

A. They were a dealer; yes, sir.

Q. What happened to the Rosslyn Company?

A. Well, we merely leased from them their silos and other parts. We put in a great deal of money in re-equipping the silos so as to be in a position to serve the trade properly.

Q. Do you know the approximate cost of getting the silos into operation?

A. Well, I would say about a hundred thousand—

Mr. MacIntyre: I object. It is irrelevant and immaterial.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: What do you want to show by this?

Mr. Brick: Well, the witness had said it had been an expensive operation; that merely led to the next question. I do not know the extent of the cost. That is what I wanted to find out.

31144 Mr. MacIntyre: The other question was irrelevant and immaterial, and because one leads to another one—

Trial Examiner Norwood: What, as to that?

Mr. Brick: I think that when three companies go into a venture of this kind, Your Honor, for the purpose of competing with a new situation which is brought about by another competitor, we ought to see the circumstances under which they do such things and the cost of such an operation. It has a lot to do with the general fact, determining the presence or absence of competition.

Trial Examiner Norwood: Well, we have come to the point where we cannot spend the time on receiving any more testimony unless it has some direct connection with the issues in the case or evidence that had been introduced here against you. That is all you have to meet, anyway.

Now, this irrelevant information here, while it might be very interesting we cannot take it unless you can show me clearly where it connects up in some way with the issues or with the evidence that has been introduced against you.

31146 Mr. Brick: I do not know what the Government has charged, Your Honor please. All I have seen is the complaint, and 50,000 pages of record. I do not know what they charge. I do not know what their position is on these things.

Mr. MacIntyre: Explaining how and why that the witness went into the warehouse combine is one thing, but explaining all the details of the expenses of going into it is another thing.

We did not object to him outlining the competitive circumstances that caused him to go into it, but this thing of getting down to what a bag nails cost that he used in manufacturing a warehouse or adding a particular portion to it, seems to me to be going far into too much detail.

Trial Examiner Norwood: Read the last question.

(Question read.)

Trial Examiner Norwood: Now, so far as the Counsel explained to me I can see no purpose of receiving this, and I shall sustain the objection and ask him to go directly to the question.

Mr. Brick: Well, if permitted so to do, I would show through the witness that the cost of putting the silo into operation was somewheres between seventy-five and a hundred thousand dollors, or $125,000.

31147 By Mr. Brick:

Q. Does that arrangement with the Lawrence Company, had with the Hercules Company and the Edison Company, still exist, Mr. Ackerman?

A. No, sir.

Q. Why was it discontinued?

A. The venture proved too expensive and we ceased operations. We did not gain sufficient business to justify the cost of operating the silos.

Q. About how much cement did the group sell through the silo, if you recall?

A. About 45,000 barrels the first year, which was 1930; about 90,000 barrels in 1931, and approximately 5,000 barrels in 1932.

Q. Does the Lawrence Company ship into the Washington market at the present time?

A. We have shipped a little cement into this market in carload lots. I do not believe it exceeded over 2,000 barrels in any one year.

Q. That is since the time you abandoned the silo arrangement?

A. Yes, sir; since we abandoned the silos.

31148 Q. Is the quarry from which your Thomaston plant obtains stone located near the mill?

A. Yes, sir.

Mr. MacIntyre: I object; irrelevant and immaterial.

Trial Examiner Norwood: Read the question.

(Question and answer read.)

Trial Examiner Norwood: The objection is sustained and the answer is struck.

Mr. Brick: Well, I offer to prove, in accordance with the answer, that it is located near the mill, and, further than that, that it is located at the mill door.

By Mr. Brick:

Q. When was the last survey made of the availability of stone from that quarry?

Mr. MacIntyre: I object; irrelevant and immaterial.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: The objection is sustained.

Mr. Brick: If permitted so to prove, I would establish through this witness that the survey was made in 1928 by Professor Benjamin L. Miller, of Lehigh University.

Now, I have probably, in the normal course of events, Your Honor, ten or twelve questions which would relate to this particular subject. Now, is it the position of Your Honor that it is immaterial and irrelevant for me to
31149 go into anything relating to the location of a quarry?

Trial Examiner Norwood: Not unless you make an explanation—

Mr. Brick: Or a fact in connection with it?

Trial Examiner Norwood: —to me which indicates some relevancy. I think that Counsel should make it clear to me that here is something that will be of value.

Mr. Brick: Well, I would undertake, then, to do that. The reason why I think it is material and relevant is that time and time again the Commission has taken the position that because of the so-called system, a maladjustment of mill locations has resulted.

An attempt was made to establish that through the witnesses Viner and Fetter, and from time to time Commission's Counsel has established the proximity of raw materials to particular mills. The Commission has also gone into the distance between mills and markets.

I cannot tell what the Government intends to argue from the facts of that kind, and the argument made by the Government to a large extent will determine the argument which we might make in reply to it.

31153 Trial Examiner Norwood: That is, isn't it very similar to the method that a great many witnesses use in answering an unwelcome hypothetical question?—

Mr. Brick: No, I think—

Trial Examiner Norwood: —by denying the existence of one of the assumptions?

Mr. Brick: No.

Trial Examiner Norwood: And this is in there as an assumption that if—that one of the effects of trade restraint would be to permit poorly located mills to exist, and so forth.

Mr. Brick: But I think, Your Honor—

Trial Examiner Norwood: Now, you are meeting that statement with denying the condition. That would
31154 not deny the statement that if there were poorly located mills, and certain restraints of trade which produced an abnormally high price, would not enable them to exist.

Mr. Brick: That is very interesting, Your Honor, and I am inclined to go nearly all the way with you.

The reason that I think it is interesting is this: That's the very way in which the Government is trying to prove the presence of conclusion, and the absence of competition. What do they do? They say we have here a situation which gives rise to waste. You wouldn't have waste if you had competition. Therefore, since there is a presence of waste, you have got collusion, and then they haven't got the full competition which they should have.

Now, that is the very argument which Your Honor does not agree with, and I do not, either, and it starts on the false assumption that is produced by the Government, and it is just that which we want to meet.

31156 Trial Examiner Norwood: And you propose to show that there is no waste at any mill in the country?

Mr. Brick: I propose showing not only that there is a minimum of waste, but that there is less waste from the delivered-price policy than there possibly could be from any other policy.

Trial Examiner Norwood: Well, you may show that if you can show it.

31158 Mr. MacIntyre: Well, if Your Honor please, in view of all the controversy that we have had up to this time, and all the time we have taken with all the witnesses that Respondents have called, with each of the Respondents—

31159 Trial Examiner Norwood: Well, if we could only settle this for one time—

Mr. MacIntyre: Yes, but it has come up with every witness.

In view of all that, and with an effort of saving—that is, towards saving time—I am going to offer now for the record a statement of Mr. Wooden as to the position he takes with respect to all of the evidence that he has offered, and which is in the record, as well as the allegations in the complaint with respect to locations of mills and all such similar details, and we expect that Your Honor will take that statement as an admission as to what effect that Mr. Wooden expects to use the evidence that has been accepted heretofore in the record as offered by the Commission.

Now, this is offered as a stipulation of Mr. Wooden's stand on the complaint with respect to those items as well as to the evidence that is offered under those items of the complaint relating to the locations of mills.

Trial Examiner Norwood: Do you mean you are offering that as an admission?

Mr. MacIntyre: Yes, I am going to give it to the Reporter for inclusion in the record as Mr. Wooden's admission.

His statement is as follows:

31160 "A check of the complaint for the specific purpose fails to disclose any allegation that the effect of the combination alleged in the complaint was to cause mills to be poorly located. The complaint does allege that the costs of producing cement vary somewhat due to natural conditions and differences in efficiency (Paragraph Eight (c)). It also alleges that the respondents who are well located with regard to raw materials, means of transportation and proximity to large consuming centers and who are well financed and ably conducted do not use those advantages by offering competitive prices (Paragraph Eight (f)). It is also charged that the effect of the alleged combination is to produce non-competitive prices and 'the adoption by concert of organized producers of prices calculated to preserve the more poorly located, equipped and conducted units at the expense of the buying public' and 'to encourage the development of excess capacity by the inducements of high prices and of fictitious freight charges obtainable by mills not located at basing points' (Paragraph Nine (1) and (5)). None of these allegations
31161 goes to the point of claiming that mills are badly located because of the basing point system. They

recognize what may be almost judicial notice that the mills are not equally well located and that their costs vary on account of differences in location.

"In the absence of any such allegation and in the absence of any proof or contention by Commission's Counsel that the basing point system caused mills to be badly located, there is no issue before the Examiner or the Commission which justifies the unlimited showing of the physical facts regarding location of mills, their raw materials and geographic relation to important consuming areas. Such evidence does not tend to prove or disprove the existence of a combination to suppress price competition. Such evidence is no more indicative of the absence of such a combination that it is of the existence of such a combination. No such evidence was offered by Counsel for the Commission for the purpose of proving the existence of such a combination. Such physical facts as were offered by Commission's Counsel were merely to show the physi-
31162 cal setting of the industry just as the Bureau of Mines might show it. No one would have the hardihood to contend that the information reported by Respondents to the Bureau of Mines or published by it would tend to prove or disprove the existence of a price fixing combination. Counsel for the Commission are willing to stipulate that they will not rely upon any such evidence to establish the existence of the combination and will not contend that such evidence does tend to establish it.

"Respondents therefore have nothing to meet on that score so far as evidence offered in support of the complaint is concerned. The only remaining question is whether such evidence is a relevant and material part of Respondents' affirmative defense. In this respect they are in no better position. Such evidence has no logical tendency to disprove the existence of the alleged combination and is therefore wholly irrelevant and immaterial to that basic issue. If it be argued that such evidence is relevant to the question of one of the effects and results of the alleged combination, the answer has already been made that no
31163 such effect or result is alleged in the complaint. Counsel for the Commission will make no attempt to argue that such evidence tends to prove that the basing point system has caused mills to be badly located or to argue that the physical facts tend to prove the existence of the combination unless the combination has first been estab-

lished by independent and direct evidence. Even though this effect were alleged and were disproved, this would not disprove the existence of the combination itself. Even though all the ordinary effects of the combination were disproved, the combination itself might still exist. The law under which the Commission operates seeks to curb such things as have a dangerous tendency unduly to hinder competition and before they develop into full-fledged restraints of trade.

"The encouragement of excess capacity is alleged as one of the effects of the combination and evidence on either side of that question is relevant but even here the existence of excess capacity does not tend per se to prove or dis-
31164 prove the existence of a combination. No economic experts were asked for an opinion as to whether excess capacity does indicate the existence of a combination. The simple reason why neither excess capacity nor more poorly located mills tends to prove or disprove the existence of a combination is that they may be the result of other well recognized factors of common occurrence such as poor business judgment or changes in economic conditions. Mills well located at the time they are built may become poorly located because of changes in consumption demands or transportation facilities. Mills poorly located may become well located by reason of some large Government construction project near it.

"Except for its time consuming qualities and its futility as proof of any basic issue Counsel for the Commission have no objection to evidence regarding the physical facts of mill and raw material location and their geographic relationship to consuming markets. It was to save time that they proposed such evidence be submitted in the form of written statements instead of oral questions and answers but Respondents' Counsel rejected that pro-
31165 posal."

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Back to the record.

Mr. Brick: What is the state of the record now, if Your Honor please?

Trial Examiner Norwood: In view of statement of Counsel for the Commission, I shall ask the Respondents' Counsel to skip over this particular subject of mill locations

until tomorrow, until we can all have time to read, study, and carefully consider this statement.

By Mr. Brick:

Q. Mr. Ackerman, when you testified the last time you were on the stand you described to some extent the marketing territory in which your Maine mill sells its cement.

Now, will you tell us the marketing territory of both of your mills? In other words, the combined territory from which you sell the product from either of your mills?

A. Well, it comprises the six New England States, New York State, with the exception of the western quarter; all of New Jersey; all of Pennsylvania up to a perpendicular line through Altoona—

31167 A. All of Maryland, Delaware, and Richmond—and Virginia, as far south as Richmond.

Q. Now, referring to Commission's Exhibit 1063-C, have you ever shipped any cement into Mississippi in recent years?

This paper I show you is the exhibit which I mentioned and indicate that your company received an invitation to bid for a letting covering cement to be used at Rolling Fork, Miss. (handing document to the witness).

A. No, sir; we have not.

Q. Now, referring to Commission's Exhibit No. 1083 (showing document to witness),—have you shipped 31168 any of your cement, that is, from either of your mills, into Alabama or Tennessee in recent years?

A. No, sir; we do not solicit business in that area.

Q. For how long have you not been soliciting business in those areas?

A. Ever since I have been with the company, which is approximately 20 years.

Mr. Brick: This last exhibit, if Your Honor please, covered an item of evidence to the effect that the Lawrence Company had received an invitation on a letting covering shipments to each of those two States.

By Mr. Brick:

Q. Now, it also appears from the record, Mr. Ackerman, that your company received invitations from the Procurement Division to bid on small lots of cement to be supplied at different points of South Carolina.

Have you ever shipped any cement to South Carolina in recent years?

A. No, sir.

Q. The exhibit to which I referred is Commission's Exhibit 1084-A, which indicates the Lawrence Company received an invitation for bids at Spartanburg, S. C.

Have you ever quoted or shipped cement to any points in Iowa, Indiana, or South Dakota, Mr. Ackerman?

A. Not since I have been with the company.

31169 Q. Now, what are the chief consuming centers served by your Siegfried and Thomaston mills?

A. Boston, New York, and Philadelphia.

Q. Does the consumption of these points and other points change from time to time?

A. Yes, sir; it does.

Q. What factors give rise to the changes?

A. Well, the amount of building that may be going on, the amount of road work, the amount of construction work of various types.

Q. Now, you have described, Mr. Ackerman, your general sales territory into which you sell cement from each of your two mills. About how many competitors do you meet in those areas?

A. About twenty.

Q. And that covers the sales area of your two mills?

A. Yes, sir.

Q. Now, in making a sale in any one particular market, with about how many sellers do you compete?

A. I would say twenty.

Q. In other words, you meet about the same number of competitors throughout your entire sales area?

31170 A. Yes, sir.

Q. Now, you testified previously to the effect that at the time you testified you had thirty salesmen, including three district sales managers. Now, does the number of people on your personnel list change from time to time?

A. Yes, sir.

Q. Do those figures represent the average size of your sales force for a period of years?

A. I would say we have had approximately thirty men in our sales force for the past 10 years, with the exception of three years when we let eight men out in an effort to curtail sales expense.

Q. Do you regularly solicit all of the area which you have included in the marketing territory of your two mills?

A. Yes, sir.

The witness identified Resp. Ex. 2183 as a statement prepared by him showing the percentage of operations at each of their two plants from 1928 to 1937 inclusive, that
31171 is percentage of Dragon Portland Cement, which was their brand manufactured in those years. He can vouch for the figures.

31173 Q. Now, that overcomes one objection I had, Your Honor. I understand what the headings are, but I do not have any way of verifying this with the records of the company.

Mr. Paulson: That is secondary evidence and I can relax the rule there with regard to that because I cannot see how it is very material in the case, but when they start bringing in these excerpts and summaries of the books in the company, why, I am going to have to object. This is objectionable on that ground. I do not see that this can hurt or help.

I do not object to this one.

Mr. Brick: Well, let me be sure I understand the position of the Government. Do you want us to bring in the books from which material of this kind has its source?

Mr. Paulson: That is correct.

Mr. Brick: And you request us to do it rather than offer tabulations on a single page of this character?

Mr. Paulson: We want you to bring the books to the hearing room. We want you to make the tabulation but we want you to bring the books so we can look at them to see if we have any different opinion.

Mr. Brick: Well, bringing the books, I do not see
31174 there is much need of making the tabulation. The witness can testify from the books. Now, what we are trying to do is to save the time not only of an examination of the books by us in the courtroom with respect to the interrogation of the witness, but we are trying to take every short cut possible by just handing in on one page, which would probably require two hours of testimony from original data.

Mr. Paulson: Yes, but, Mr. Brick, you well know—

Mr. Brick: And that has been vouched for.

Mr. Paulson: You well know that the witnesses—even the witnesses in the cement industry are not infallible, and they could very well make an incorrect take-off from the

books and you would be misled, and we would be misled and His Honor would be misled, and the Commission would be misled.

Trial Examiner Norwood: Are these books open to the inspection of a representative of the Federal Trade Commission?

Mr. Brick: What do you mean? They are private books. Of course they are not open to anybody.

Trial Examiner Norwood: Those books, that is the corporation records, isn't it?

Mr. Brick: Yes, sir.

Trial Examiner Norwood: Are they open to the
31175 inspection of a representative of the Federal Trade Commission?

Mr. Brick: Under what circumstances and for what purpose?

Trial Examiner Norwood: For checking these?

Mr. Brick: For checking these?

Trial Examiner Norwood: Yes.

Mr. Brick: Oh, that is a matter of the individual company's prerogative, if Your Honor please.

Trial Examiner Norwood: Well, if they are not open I shall not receive it.

Mr. MacIntyre: Mr. Brick is standing here as Counsel for this company and he can tell us whether or not they are open for inspection there.

Mr. Brick: Oh, no, I can't. I am not the kind of lawyer who tosses around other people's books. That may be a habit of some people but it is not one of mine.

Trial Examiner Norwood: Well, if supporting data is not here we will have to apply the rule that we have heretofore, that we have not received tabulations where the supporting data was not open to the inspection of the other side.

Mr. Brick: Why, if Your Honor please, we have operated continually under a stipulation, the benefits of which were claimed by the Government all the time they
31176 were putting in their case. Are we going to scrap that stipulation now?

Trial Examiner Norwood: I do not think this comes under that.

Mr. Brick: How is it that we only run into difficulties about time saving, and one thing and another, when it is evidence when it is helpful to the defense? That is an important point, Your Honor.

Mr. MacIntyre: If Your Honor please, there is no objection to the tabulation when verified.

31178 (RESP. EX. 2185 was offered and received in evidence.)

By Mr. Brick:

Q. Mr. Ackerman, I would like to call your attention to this exhibit and particularly that part of it which shows that in 1928 the Northampton plant operated 73.3 percent capacity, and in 1937 35.2 percent, and the same relative figures for the Thomaston plant, with respect to the years, 61.8, and 33.2 percent.

A. Yes, sir.

Q. Did the drop in sales indicated from the decline in percentage of operation affect your selling costs?

A. Yes, sir; it did.

By Mr. Brick:

Q. In what way?

31179 A. It increased our sales cost considerably.

31182 In 1920 through 1930, approximately, Lawrence's Siegfried mill operated at its full capacity. I think

31183 it operated a full capacity between 1910 and 1920. When I say "operated at full capacity", I mean 100% storage capacity. Certain seasons of the year, usually from about the 15th of November to the 15th of March, consumption of cement and, therefore, shipments of cement, are low, due to seasonal conditions, outdoor weather conditions. Those months we usually loaded our store houses, and when they got full, we curtailed manufacturing and as soon as spring came and shipments resumed in volume we resumed operations in full; that is, manufacturing operations, in full. Most concrete work is outdoor work, and due to cold, snow, inclement weather, many contractors preferred to shut down their jobs during the winter, and resume in the spring. Of course, there are exceptions to that, but as a general practice that is true. The first two years that the Thomaston mill was in operation it operated at full capacity, I would say,

31184 that is, with the limitations that I have indicated. We are up against a much more seasonable business condition in New England, than we are in this area.

Q. Do you personally determine the selling policies of the Lawrence Company?

A. Yes, sir.

Q. Do you confine your shipments to any definite territorial limits?

A. Pretty much to the territory that I described.

Q. How do you determine that territory? In other words, the area in which you solicit your business?

A. Well, it is on our relationship with the trade in that area. If we feel that we can give satisfactory service to gain and maintain customers, we solicit business in that area. Sometimes a winter job may be more attractive than a summer job. We might extend our solicitation a little further in the wintertime than we do in the summer in an effort to keep the plant busy when it normally would be closed. Occasionally a concern with whom we have been accustomed to do business regularly might get a job outside our normal area; in order to maintain our relationship with him we would seek his business in that area, provided, of course, it was not too far away.

Q. In connection with your prior testimony, Mr. Ackerman, you made several references to the term "mill net." Just what do you mean by that term?

A. "Mill net," to me, means the amount we get 31185 after deducting freight, packages, and cash discounts from our selling price.

Q. Do you find any great variation in your sales expense?

Mr. MacIntyre: I object; it is irrelevant and immaterial.

Trial Examiner Norwood: Read it.

(Question read.)

Trial Examiner Norwood: How is that relevant, Mr. Brick?

Mr. Brick: Well, it is to clear up a situation that appeared in his prior testimony. I just thought it would be helpful. I would not have introduced the subject originally but that was gone into to some extent in his prior testimony. I do not know what the Government went into it for.

Trial Examiner Norwood: Objection sustained.

At that time the issues were not as clear as they are now, and some of the matters there where it is just evident that no inference could be drawn against your interest on it, and where its irrelevancy is much more apparent at this time, why, I do not see any use in your meeting it. If there is anything in the original record that that

is to meet, and you point it out to me, I will consider striking it.

Mr. Brick: Well, I indicated it, Your Honor—I
31186 do not know the purpose for which the Government got into those subjects.

Trial Examiner Norwood: Go ahead.

Mr. Brick: They did it in connection with witnesses of different companies, and they partially got into it in connection with this very same witness while he was on the stand in their behalf; and I might add in connection with the comment of Your Honor that we do not subscribe to the statement which Your Honor made; that is, at the very early stages of this proceeding we indicated what would happen if the evidence were received without limitation and without regard to the issues. Now, the burden of the scope and size of the Government's case can't be placed on our shoulders. We indicated not only to Your Honor but to the Commission.

Trial Examiner Norwood: I understand that but I think it is Counsel's duty either to point out to me the relevancy under the issues or point out to me what evidence it is intended to meet, one of the two.

Mr. Brick: If that did not create an anomalous situation we could, Your Honor. We objected at the time the Government introduced its great mass of material, that we did not know the purpose for which it was being offered, that because of it we would not be able to meet the evidence which went into the record. We claimed
31187 at that time before Your Honor and before the Commission that that would have a strong tendency to deprive us of due process. In other words, we could not fairly meet the situation because it was a shotgun case, and at the close of the case—

Trial Examiner Norwood: I do not say that we have any testimony in here like that, but I am merely suggesting that the issues are clearer now.

Mr. Brick: Well, they are no clearer to us that they were the first day we came in.

Trial Examiner Norwood: Go ahead.

Mr. Brick: I just want to make sure, and—

Trial Examiner Norwood: Rather, not the issues, but the case.

Mr. Brick: But the case was clear to us, too.

Trial Examiner Norwood: Yes. Well, go ahead.

Mr. Brick: And of course we made our motions to strike, in any event.

Trial Examiner Norwood: All right.

By Mr. Brick:

Q. Mr. Ackerman, you have stated that you no longer sell cement in the District of Columbia because of the competitive conditions there not permitting you to enjoy any return from that market. Now, are there any other areas which have been abandoned by the Lawrence Company?

31188 A. Yes, sir; there are.

Q. What are they, please?

A. Well, in my time we have abandoned the western quarter of New York State, the northwestern part of Pennsylvania.

Q. At one time did your company sell west of the Mississippi River?

A. Yes, sir.

Q. And shipments were made from the Lehigh Valley, I take it?

A. Yes, sir.

Q. And did you obtain good volume from any of these areas which have since been abandoned?

A. Yes, sir. The Government locks at the head of the Mississippi River are built out of our cement.

Q. Now, what were the considerations which led to the abandonment of these areas; the territory at which you sold and solicited business?

A. Well, it was increased competition, new mills being able to give more prompt service resulting in our losing our edge with our customers; also cases of lower prices in those areas at great distances from our plant.

Q. Did service have anything to do in a major way with the situation?

A. Yes. After all in many cases the new mills were able to make overnight deliveries whereas it took us perhaps a week to get a car of cement out there. We lost out in those markets.

31189 Q. And are you able to at all compete in those markets today?

A. No, sir; we are not.

Q. Now, after your mill was established at Thomaston, Me., did you find that any of your competitors were forced out of the State of Maine?

A. No, sir. I would say that we have considerably increased our business and taken away business from our competitors up there, but they are still active and they still seek the business up there and are still getting some.

Q. Well, is your mill located in such a way that—well, why don't you explain the situation in the markets of New England, Mr. Ackerman, as a result of your new
31190 mill being up there and indicate the advantages in so far as they might have affected your company?

A. Our mill is located at Thomaston, Me., which is approximately the same distance from Boston, Mass., that the Hudson River mills, situated at Hudson and Austin, N. Y., are from Boston. In other words, from a service angle, I would say that neither the Hudson River mills nor our mill has any advantage at Boston. As you go east from Boston towards Thomaston, our service advantage increases; likewise, as you go west from Boston towards Hudson their service advantage increases.

Maine is a very large State. It takes in many instances three or four days for a car of cement to go from our plant to a destination in Maine. The railroads do not run as frequently; that is to say, they do not have as frequent
31191 freight service in Maine as they do in more populous areas such as New York and western Massachusetts. Very often a car can reach Maine from the Hudson area in the same time as a car from our plant could reach the same destination in Maine. However, there are certain advantages to being located in Maine. The people of the State are proud of the State. We have drilled into them through our sales organization, buying in Maine helps Maine, and in that way we have increased our percentage of business in Maine. Today we do approximately 65 percent of the business done in the State of Maine on cement.

Q. When you were last on the stand, Mr. Ackerman, you stated that the Lawrence Company sold its cement at delivered prices. Now, do you today quote at only delivered prices?

A. Yes, sir; we quote only at delivered prices with the possible exception of the railroads or of a railroad.

Q. In what—

A. We did quote the Government at one time a price at our mill in Thomaston in connection with the Pasamaquoddy Dam.

Q. In order that your testimony may be clear, will you state how you actually do quote railroads?

A. We quote the railroads on which our mill is
31192 located f.o.b. cars our mill. Other railroads we quote f.o.b. nearest junction point.

Q. Do you make any sales f.o.b. mill?

A. No, sir; with the exception of the railroads.

Q. And what are the reasons for that policy?

A. Well, there is no business at our mill. We have no customers at the mill.

Q. Do you recall whether or not the policy of sales at delivered prices was the policy of the company when you first became associated with it?

A. It was.

Q. I show you a copy of Commission's Exhibit 1339, and ask you if you recall having received that proposal in connection with the letting to which I made reference?

A. Yes, sir; we received this proposal.

Q. And you did not bid on this proposal?

A. No, sir; we did not bid.

Q. What were your reasons for not bidding?

A. Well, it didn't appear to me as if this was a sincere inquiry. In addition to that the quantity was indefi-
31193 nite, the rate and amount of delivery was indefinite, and the time of delivery was indefinite, and we did not feel that we could make an intelligent bid, and, therefore, decided not to.

Q. Did you make known to the Procurement Division your reasons for declining to quote—

A. No.

Q. —or to bid?

A. No, we just did not bid.

Q. Has the Lawrence Company at any time submitted an f.o.b. mill bid to the United States Government?

A. Yes, sir; I think in one instance in connection with the contemplated Pasamaquoddy Dam at Eastport, Me.

Q. I show you Commission's Exhibit 1399, which is a proposal for bids on cement to be used in New Jersey, and ask you whether you recall having received a copy of that proposal?

A. Yes, sir; I recall having received a copy of this proposal.

Q. And Commission's Exhibit 1395, which is a mailing list covering the companies to which the proposal was sent, which indicates that one was forwarded to the Lawrence Company. Did you bid?

A. No, sir; we did not.
Q. What were your reasons for not bidding?
A. Substantially the same as on the other one,—too indefinite.
31194 Q. When you say "the other one," do you refer to Commission's Exhibit 1339 (indicating)?
A. Yes, sir; the one I just testified to, a book or—
Trial Examiner Norwood: Is that an invitation which calls for an f.o.b. mill price?

By Mr. Brick:

Q. Can you answer that?
Trial Examiner Norwood: Was it?
The Witness: I believe it called for an f.o.b. mill price, as well as zoned prices, and several other things. It was not just clear to us just what they were driving at, sir.
Trial Examiner Norwood: I see.

By Mr. Brick:

Q. Now, I show you Commission's Exhibit 1391, which is a mailing list of the Procurement Division sent to prospective bidders in West Virginia and Ohio projects (showing document to witness).
Just to save time, I might ask you, Mr. Ackerman, did you bid in connection with the Procurement Division's invitation covering cement to be used in West Virginia or in Ohio, in opening of May 18, 1938?
31195 A. No, we did not.
Q. Now, is West Virginia or Ohio within your normal marketing area?
A. No, sir; they are not.
Q. Now, in connection with any of these proposals with respect to which you did not bid, did you have any consultation with any of your competitors prior to the time of the letting?
A. No, sir; none whatsoever.
Q. Now, when you quote on sealed bids, Mr. Ackerman, how do you arrive at the figure which you quote?
A. We use our commercial price at the destination in question.
Q. What percentage of your total sales do you make directly to the Federal Government, approximately?
A. Oh, not over one percent.
Q. And for what period of time would that one percent apply?

A. Oh, the last several years, probably prior to that it was less.

Q. Would you say that your sales expense in connection with direct sales to the United States Government, and its various branches, was less than the cost of other direct sales?

31196 A. I wouldn't say our expense in connection with direct sales to the Government is less than our sales expense to other buyers.

I will admit, however, that should the Government be in the market for a million barrels of cement, and we were able to obtain it as the result of bidding, that the sales expense in connection with that bid would be less than smaller jobs; but, bear in mind, that most of the

31197 Government purchases today are in single carloads of cement. We have to virtually sign our life away in preparing our bid. We have to send a salesman to cover the letting, and the Government always reserves the right to reject all bids, and often does, and we have gone through a great many motions to no avail.

Q. How many barrels in the carload?

A. The minimum carload is 132 barrels.

Q. Have you ever given any price concessions to the Government?

A. We always quote the Government our lowest price.

Trial Examiner Norwood: Is that any lower than what you sell to dealers—than what you charge dealers?

The Witness: No, sir; we don't think the Government is any better customer than a dealer.

By Mr. Brick:

Q. I might develop that a little further, Mr. Ackerman: For what reasons don't you think the Government is as good or a better customer than dealers?

A. Well, my experience with the Government has been that they always have the last say; they are rather arbitrary in their dealings with us. I have had many cases where they have taken unearned discounts, and we have not been able to collect them. We know the people—I may change that; Our customers we usually know; they have been customers of ours for many years. The Gov-

31198 ernment is here one minute and gone the next, and—

Trial Examiner Norwood: The Government business is not repeating business, is it?

The Witness: No, sir; it is not steady, it is not regu-

lar, and although I am glad to bid on it today with business such as it is, but if we had all the volume that we could take care of I would be glad to pass up the Government business.

Trial Examiner Norwood: Well, how about the matter of having a great many shipments, in smaller quantities, to different people? How about that having a stabilized effect on your business,—does that have that effect or not?

The Witness: You mean stabilizing as to production, steady production?

Trial Examiner Norwood: Well, as to the business—your sales?

The Witness: Well, I would much rather do business with a thousand customers, say, at a thousand barrels a piece a year, giving me a million barrels a year, than I would with just one customer buying just a million barrels.

Does that answer your question, sir?

Trial Examiner Norwood: Yes.

31199 By Mr. Brick:

Q. Now, when did you first have experience with Lawrence's method of figuring its prices?

A. Oh, when I first went to work in 1920.

Q. Do you know whether or not there is a difference in the method Lawrence used in figuring its prices at that time in 1920—

A. I wouldn't say—

Q. —and the method it uses today?

A. I couldn't say there was any difference in the method employed 20 years ago, and that employed today.

Q. And what method do you follow today?

A. We meet competition at destination.

Q. How far is your Siegfried mill from Northampton?

A. Well, Northampton is the post office.

Q. The post office for Siegfried?

31200 A. Northampton is the post office for Siegfried. I would say it is a few hundred yards.

Q. It is right in the same town, I take it?

A. Yes, sir.

Q. Are there any other mills located within a radius of five or six miles of Siegfried?

A. Yes, sir; many.

Q. Did you consider the establishment of a base at Thomaston prior to 1938?

A. Yes, sir.

Q. Had you considered it before your plant went into operation?

A. Yes, sir.

Q. And what decision did you make at that time?

A. We concluded not to have a base at the plant but to continue to meet the existing competitive prices
31201 at the various stations at which we seek business.

Q. When you did establish Thomaston as a basing point did you give any advance information to any of your competitors?

A. No, sir.

Q. Has your competition met the new prices which you quoted and which reflected your base at Thomaston?

A. As far as I know; yes, sir.

31202 Q. Were the new prices higher or lower than the old prices?

A. They were lower, sir.

Q. Do you recognize any mills of your competitors as being basing points?

A. Yes, sir.

Q. Do you ever know in advance of any change in the status of a mill—that is, from base to non-base or vice versa?

A. No, sir.

Q. How did you get your information with regard to such changes?

31203 A. Well, when a change takes place we are notified either by our customers or by our salesmen that the change has taken place. We make an analysis or a study of the change; sometimes such a change would indicate a lowering of a base or perhaps a raising of the base, or perhaps sometimes a change might indicate no change in a base as far as we could determine.

Q. You said that you make an analysis and a study of something or other. Now, what is it that you analyze and study?

A. Well, can I be—go into detail and explain that practically?

Q. I have no objection.

Trial Examiner Norwood: Do you require that?

Mr. Brick: I think so, Your Honor, to make his answer clear.

Trial Examiner Norwood: Don't you study this price

and figure back to a basing price and apply that to points where you haven't received information what the delivery price is?

The Witness: That is the idea exactly.

By Mr. Brick:

Q. That is the prices, then, that you study? It is the prices which you pick up, I suppose, then, that you study and analyze?

A. Yes, sir.

31204 Q. Do you request your customers to send you in these changes in prices?

A. We do not request our customers, do not have to, sir. They notify us pretty quickly whether they have a lower price from somebody else than they have from us. For example, I may have sold a man a car of cement yesterday. It may be en route to him—

Trial Examiner Norwood: I understood that but I want to know whether or not you requested it.

The Witness: I do not request the customers. I may send my salesman around and ask them to try and get the information. I would not be stampeded by a customer's say so.

Trial Examiner Norwood: Do these salesmen request the customer to let them know of a change in price?

The Witness: They do not request them to; they do not have to. They do not request them; no, sir; the customer volunteers that information.

Trial Examiner Norwood: Well, do they to your knowledge or do they not tell the customer to let them know if there is a change in price on the part of a competitor so they could meet it?

The Witness: Well, I would say they do; yes, sir.

By Mr. Brick:

Q. And what are the circumstances, Mr. Acker-

31205 man, which lead to the customers always passing along price information of that character to your company?

A. Well, they want us to keep them competitive. They may have a contract with us for cement to supply to a certain operation. Somebody, one of our competitors, may reduce their price and they immediately turn to us and say, "Why, we can buy cement for less money. We are not going to pay you any more than this other fellow

and continue to furnish your cement on that job unless you meet that price." We may have cars in transit and have cars that just arrived. They expect us to lower our price to them on the basis of the new quotations they have received.

Trial Examiner Norwood: Well, do you do that on undelivered cement?

The Witness: Oh, yes.

Trial Examiner Norwood: On orders previously accepted?

The Witness: Yes, sir.

Trial Examiner Norwood: You reduce it if your competitor reduces, then you, on the unshipped balance of his previous order, you reduce the price?

The Witness: Yes, sir.

By Mr. Brick:

Q. And for what period of time is that reduction effective?

A. As far as to orders—well, today, we adjust 31206 retroactively five days.

Q. And as far as the point raised by the Examiner, it not only applies to shipments which are in transit but is retroactive five days?

A. Yes, sir.

Q. Covering the shipments which have left your mills within the five-day period up to the effective date of your new price; is that right?

A. Yes, sir.

Q. Or your announcing price?

A. As well as any business that may have been given to us by the trade for shipments in the future.

Q. Now, have you ever had any agreement or understanding with any competitor that you would recognize or maintain any mill as a basing point?

A. No, sir.

Q. Or to maintain or to recognize any specific basing price?

A. No, sir.

Q. Now, I refer you, Mr. Ackerman, to Commission's Exhibit 969-6-M, 7-C. Now, do you recall quoting prices on a dual base from Siegfried as appears in that exhibit covering the period from September 11, 1931, to May 31, 1932?

A. I remember the dual base we had at Siegfried in that year.